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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

EMC MORTGAGE CORPORATION,
Petitioner,

v.

STANLEY WILLIAM STARK; PATRICIA GARNET STARK,
Respondents.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The parties to an arbitration agreement in a mortgage contract expressly agreed that any damages that might be awarded "shall in no event include consequential, punitive, exemplary or treble damages as to which borrower and lender expressly waive any right to claim to the fullest extent permitted by law." The District Court refused to enforce an arbitrator's award of punitive damages based on this plain language. The Eighth Circuit reversed, reinstating the arbitral award of $6 million in punitive damages to Respondents, which exceeded Respondents' actual damages of $2,000 by a ratio of 3000:1. The Eighth Circuit based its ruling on a new and unforeseeable reading of Missouri law (one that the court had rejected three years earlier) as prohibiting the waiver of punitive damages for intentional torts—a reading that Petitioner EMC Mortgage Corporation ("EMC") was not on fair notice of, and that the parties could not possibly have intended to incorporate into their arbitration agreement when they entered into it. The questions presented are:

1. Did the Eighth Circuit deprive petitioner EMC of "'fair notice . . . of the conduct that will subject [it] to punishment'" in violation of due process, *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 417 (2003) (quoting *BMW of North America v. Gore*, 517 U.S. 559, 574 (1996)), when it overturned the parties' settled expectations and express agreement that punitive damages could not be awarded by the arbitrator, based on its unforeseeable reading of state law?

2. Does an arbitrator "manifestly disregard the law" when he imposes a punitive damage award that cannot, on its face, be reconciled with this Court's precedents establishing outer due-process limits on the magnitude of punitive damage awards?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner and Defendant EMC Mortgage Corporation ("EMC"), a Delaware corporation, is a wholly-owned subsidiary of The Bear Stearns Companies, which is also a Delaware corporation.

Respondents and Plaintiffs Stanley William Stark and Patricia Garnet Stark are natural persons.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner EMC Mortgage Corporation ("EMC") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS AND ORDERS BELOW

The Eighth Circuit's August 26, 2004 decision reversing the district court's order vacating in part the arbitral award of punitive damages in this case (Pet. App. 1a-14a) is reported at 381 F.3d 793. The District Court's May 8, 2003 amended order confirming in part and vacating in part the arbitrator's award in this case (Pet. App. 15a-20a) is unreported. The arbitrator's September 9, 2002 "Declaration of Law and Limited Findings of Fact," concluding that he had the power to award punitive damages in this case (Pet. App. 22a-23a), is unreported. The arbitrator's November 25, 2002 award (Pet. App. 24a-34a) is unreported.

JURISDICTION

The Eighth Circuit entered its judgment on August 26, 2004. It then denied EMC's timely petition for panel rehearing and rehearing en banc, with three judges voting to grant rehearing en banc, on November 5, 2004. Pet. App. 21a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST., amend. V.

For the relevant statutory provisions, please see Pet. App. 35a-36a.

STATEMENT OF THE CASE

This case presents two significant questions regarding the application of this Court's punitive damages jurisprudence under the Due Process Clause to the increasingly important and widely used forum of arbitration. The Eighth Circuit's reinstatement of an arbitrator's 3000:1, $6 million punitive damages award highlights the extent to which the lower courts require this Court's authoritative guidance on the constitutional limits to punitive damages awards in this context. The Eighth Circuit's decision directly undermines the longstanding federal policies favoring arbitration, protecting against arbitrary and excessive awards of punitive damages, and ensuring the expeditious and limited recovery of damages under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692o. The decision disrupts a commercially significant area of federal law in which Congress specifically intended parties to be able to bargain for, and rely with certainty upon, predispute arbitration contracts as a means of preventing such arbitrary, excessive, and erratic punitive damage awards.

1. In 1999, Respondents borrowed money from EMC's predecessor and secured the loan with a mortgage on their house. They entered into an agreement to arbitrate or mediate any disputes that might arise between the parties. Pet. App. 15a-16a. Both in their Deed of Trust and in a separate Acknowledgement and Agreement to Mediate or Arbitrate that they executed, Respondents expressly agreed with EMC's predecessor as follows:

> IF THE APPOINTED ARBITRATOR SHOULD AWARD ANY DAMAGES, SUCH DAMAGES SHALL BE LIMITED TO ACTUAL AND DIRECT DAMAGES AND SHALL IN NO EVENT INCLUDE CONSEQUENTIAL, PUNITIVE, EXEMPLARY OR TREBLE DAMAGES AS TO WHICH BORROWER AND LENDER EXPRESSLY WAIVE ANY RIGHT TO

CLAIM TO THE FULLEST EXTENT PERMITTED BY LAW.

Pet. App. 18a, 40a, 64a. In the Deed of Trust, Respondents also expressly agreed that the lender could "do . . . whatever is necessary to protect the value of the Property and Lender's rights in the Property," including "entering on the Property." Pet. App. 53a.

The next year, Respondents defaulted on their loan, invoked bankruptcy protections, vacated their home, and moved into an apartment across the street. Pet. App. 3a. From October 2000 to March 2001, EMC allegedly attempted to contact Respondents personally by, for example, mailing several mandatory notices to Respondents themselves, instead of their lawyer. Pet. App. 2a.

2. These attempts gave rise to a lawsuit filed by Respondents against EMC in April 2001, alleging only violations of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692o, and related federal statutes, under which punitive damages were not recoverable. Pet. App. 2a, 16a-17a; *see infra*, at 19.

After the District Court ordered the dispute to be referred to arbitration, EMC carried out its contractual obligation to investors in loans securitized by properties such as the Starks' to secure the premises by retaining a company to ensure that Respondents' vacant home was protected from the elements and from vandalism. Acting pursuant to the terms of the Deed of Trust signed by Respondents, an employee of the company entered Respondents' vacant home to post a sign in the front window that read in full: "'Property has been secured and winterized. Not for sale or rent. In case of emergency call 1st American (732) 363-3626.'" Pet. App. 3a.

After this sign was posted, Respondents amended their complaint to add a state-law tort claim of intentional infliction of emotional distress, for which they sought punitive damages. Pet. App. 3a; Appellee's Appendix ("AA") at 226. Respondents initially requested only "$165,285" in punitive

damages, and submitted a paucity of evidence on this newly added claim. AA at 36; Appellants' Appendix at 409.[1]

3. In his September 9, 2002 "Declaration of Law and Limited Findings of Fact," the arbitrator acknowledged that the arbitration agreement "specifically states that the Arbitrator cannot award punitive damages." Pet. App. 23a. He then asserted, without any support from the text of the agreement, that "[i]n at least three places the Stark's [sic] are promised that they can seek all damages allowed by law, and then that promise is taken away." *Id.* The arbitrator relied on this unsupported premise to conclude that "[t]his is the keystone of an ambiguous contract, and the Agreement is to be interpreted in [Respondents'] favor. As a matter of law they are not prohibited from seeking punitive damages from EMC." *Id.*

Two and a half months later, the arbitrator awarded Respondents "$1,000.00" in "actual damages," "$1,000.00" in "statutory damages," plus attorneys' fees and the costs of the arbitration, and "punitive damages [i]n the amount of $6,000,000.00." Pet. App. 29a.[2] The arbitrator found that

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[1] For example, when Mr. Stark was asked by his own attorney whether he thought that "people in town were aware of" the posting of the sign, Mr. Stark responded, "I don't know." AA at 73. And when his own attorney asked him whether he had "ever experienced any stress related to this," Mr. Stark responded: "Well, yes, I guess. Yes." AA at 75. When Mrs. Stark was asked by her own attorney whether "people" have "mentioned the sign in the window," Mrs. Stark stated: "I don't know so much about the sign, but when they – we've had people asking if they can buy [the house]." AA at 131. Indeed, when asked whether one can read what the sign says "[i]f you're standing out on the street," Mrs. Stark responded, "I don't know." AA at 147.

[2] The arbitrator punished EMC based on the completely irrelevant net worth of its parent company, and based on his subsequently corrected miscalculation of what one percent of that parent company's net worth was. As the Eighth Circuit explained (mistakenly confusing EMC, a non-public company, with its parent): "The arbitrator indicated the award of punitive damages was calcu-

even though Respondents had vacated their home well before the property-preservation company entered the premises to post the sign, "this conduct [was] reprehensible and outrageous and in total disregard of plaintiff's [sic] legal rights." Pet. App. 28a.

4. Respondents filed a motion with the District Court to confirm the award. EMC filed a cross-motion arguing *inter alia* that the parties drafted their agreement to make it "clear and unequivocal" that there could be no punitive damages and that the award here was so excessive as to violate due process. Appellants' Appendix at 263, 269-71.

While "mindful that the parties bargained for an arbitrator's decision, not a judicial decision, that deference is due to an arbitrator's interpretation of the parties' agreement, and that the grounds for vacating an award are quite narrow," the District Court recognized that "this is a circumstance in which the award of punitive damages may, and must be, vacated." Pet. App. 18a-19a. The court reasoned as follows:

> After reviewing the documents in question, the Court respectfully disagrees with the Arbitrator's conclusion that the availability of punitive damages is ambiguous. The parties identified three sources of rules to govern their arbitral obligations, and declared that one – their written agreement – would govern in the event of any conflict between them. The parties also specifically agreed that the arbitrator could not award punitive damages. This is not amenable to an interpretation that punitive damages could be awarded, and the Court concludes the Arbitrator exceeded his authority in awarding them.

[Footnote continued from previous page]

lated as one percent of EMC's shareholder equity. One percent of equity, however, would have resulted in an award of $60,000,000. The arbitrator later clarified this mistake indicating it was his intent to award $6,000,000." Pet. App. 4a n.1.

Pet. App. 19a (footnote omitted). Consequently, on May 8, 2003, the District Court vacated the arbitral award of punitive damages, and otherwise confirmed the arbitrator's award. Pet. App. 20a.

5. On August 26, 2004, a panel of the Eighth Circuit (Bye, Heaney, and Smith, JJ.) reversed the district court's vacatur of the arbitral award of punitive damages. Pet. App. 1a-14a. In his opinion for the court, Judge Bye "conclude[d] [that] the arbitration agreement unambiguously *permitted* the award of punitive damages," and concluded in the alternative that the arbitrator's award "was not irrational" because the arbitrator "could reasonably conclude" that the arbitration "agreement is ambiguous" as to whether punitive damages were awardable and because any ambiguity should be resolved in Respondents' favor. Pet. App. 7a-11a (second emphasis in original).

The Eighth Circuit reached out in this case to reinstate a $6 million punitive damage award that exceeded Respondents' actual damages of $2,000 by a 3000:1 ratio, based on the following convoluted reading of the arbitration contract and of Missouri law. (1) The arbitration contract's express waiver of and limitation on punitive damages (any damages awarded "shall in no event include consequential, punitive, exemplary or treble damages as to which Borrower and Lender expressly waive any right to claim") waives the right to claim punitive damages "'to the fullest extent permitted by law.'" Pet. App. 8a (quoting Pet. App. 40a). (2) The Agreement states that "[t]he laws applicable to the arbitration proceeding shall be the laws of the state in which the property which secures the Transaction is located." Pet. App. 9a, 39a, 63a. (3) Therefore, Missouri law supposedly governs the question of the waivability of punitive damages, even though the contract explicitly recites that the arbitration is governed by its terms and by the Federal Arbitration Act and the rules of the American Arbitration Association. Pet. App. 39a. (4) Under Missouri law, "'there is no question that one may never exonerate oneself from future liability for intentional torts or for gross negligence, or for activities involving the

public interest.'" Pet. App. 8a (quoting *Alack v. Vic Tanny Int'l of Mo., Inc.*, 923 S.W.2d 330, 337 (Mo. 1996)). (5) According to the Eighth Circuit, "[a]n attempt to procure a waiver of punitive damages is an attempt to exonerate oneself from future liability for intentional torts or gross negligence, because the remedy of punitive damages would otherwise be available for such acts." Pet. App. 8a.

The court cited no authority in support of extending *Alack* or the authorities cited by *Alack*, which deal only with the separate question of waiver of *liability* for entire claims or causes of action sounding in tort, to the waiver of particular forms of relief that may be available under such claims. *See id.* at 8a-9a; *but see infra*, at 12-14. And three years before its decision in this case, the Eighth Circuit had reached the exact opposite conclusion, finding that nothing in Missouri law suggests that parties are precluded from limiting the availability of punitive damages in their arbitration contracts. *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 681-82 (8th Cir. 2001).

In support of its alternative holding that the arbitrator's finding of an ambiguity was not irrational, the Eighth Circuit explicitly analogized this case to *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). Pet. App. 10a. "As in *Mastrobuono*," the court reasoned, "an arbitrator interpreting this agreement could reasonably conclude the apparent conflict between the arbitration clause and the choice of laws provision introduced an ambiguity into the agreement." Pet. App. 10a. In so reasoning, however, the Eighth Circuit apparently overlooked the fact that the arbitration agreement in *Mastrobuono* "contain[ed] no express reference to claims for punitive damages," *Mastrobuono*, 514 U.S. at 59, in contrast to the arbitration agreement at issue here.

In the final section of its opinion, the Eighth Circuit rejected EMC's argument that the arbitral award of punitive damages was arbitrary and excessive and violated due process, applying minimal scrutiny under the "manifest disregard of the law" standard. Pet. App. 11a-12a ("'[A]n arbitration

decision only manifests disregard for the law where *the arbitrators clearly identify the applicable, governing law and then proceed to ignore it.*'") (quoting *Hoffman v. Cargill Inc.*, 236 F.3d 458, 461-62 (8th Cir. 2001) (emphasis in original)); *see also id.* at 12a ("'A party seeking vacatur [based on manifest disregard of the law] bears the burden of proving that the arbitrators were fully aware of the existence of a clearly defined governing legal principle, but refused to apply it, in effect, ignoring it.'") (quoting *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003)).

Even though the ratio of punitive to compensatory damages in this case is 3000:1, the Eighth Circuit rejected EMC's argument that the arbitral award of punitive damages could not withstand scrutiny under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). It reached this result in part because "[t]he arbitrator's decision predates *State Farm* making it impossible for the arbitrator to have identified the decision as controlling." Pet. App. 13a n.3.

The Eighth Circuit concluded that "it is apparent the arbitrator did not disregard governing law" because:

> The arbitrator's award was intended to punish EMC and to deter others from similar conduct. In arriving at the appropriate amount, the arbitrator specifically found the $6,000,000 award (amounting to one-tenth of one percent of shareholder equity) was "not great punishment but it should act as a deterence [sic]." Appellee's app. at 18; *see also Barnett v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639, 655 (Mo. App. 1998) (holding under Missouri law the net worth of a defendant is relevant when determining the extent of punitive damages necessary to punish and deter the defendant).

Pet. App. 13a.

6. On November 5, 2004, the Eighth Circuit denied EMC's timely petition for rehearing en banc and rehearing by the panel, with Judges Wollman, Riley, and Gruender voting for rehearing en banc. Pet. App. 21a.

REASONS FOR GRANTING THE WRIT

This case squarely presents questions of exceptional importance. The Eighth Circuit's opinion retroactively imposes an unconstitutional punishment without the kind of fair notice mandated by the Due Process Clause, and contravenes three important federal policies, each of which independently would warrant this Court's protection. In reinstating a punitive damages award that was 3000 times greater than Respondent's actual damages, and that was imposed pursuant to an arbitration agreement expressly precluding punitive damages, the Eighth Circuit's decision contravened: (1) the federal policy favoring arbitration and the corollary that parties should be able to establish and rely on the parameters of arbitration and the arbitrator's powers with certainty; (2) the due-process protections against arbitrary and excessive punitive damage awards; and (3) the policy favoring the expeditious and limited recovery of damages under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692o.

"[D]ue regard must be given to the federal policy favoring arbitration." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989). That policy would be undermined if parties could not bargain for, establish, and rely with certainty upon limits on the scope of arbitration and the power of arbitrators. After all,

> [a]rbitration under the [Federal Arbitration] Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, . . . , so too may they specify by contract the rules under which that arbitration will be conducted.

489 U.S. at 479 (citation omitted).

Here, Respondents and EMC's predecessor bargained for protection under the FAA and the rules of the American Arbitration Association against the "acute danger of arbitrary deprivation of property" posed by "punitive damages." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). They did so by explicitly agreeing that any damages that might be awarded "shall in no event include consequential, punitive, exemplary or treble damages as to which Borrower and Lender expressly waive any right to claim." Pet. App. 40a.

The Eighth Circuit nonetheless held that the arbitrator's award of punitive damages must be enforced, thereby declining to "give effect to the contractual rights and expectations of the parties," *Volt*, 489 U.S. at 479. It did so based on a novel reading of state law that EMC could not reasonably have anticipated. EMC was therefore deprived of "'fair notice . . . of the conduct that will subject [it] to punishment'" as mandated by the Due Process Clause. *State Farm*, 538 U.S. at 417 (quoting *Gore*, 517 U.S. at 574). This conflict with a recent decision of this Court introduces significant uncertainty to the law governing arbitration, will be a powerful disincentive to use of the arbitration process, and therefore warrants review in its own right.

The Eighth Circuit's opinion does more than deprive parties of fair notice that their conduct is subject to punishment by an arbitrator. Although that due-process deprivation alone is a strong disincentive to arbitration, the court's confirmation of the particular award imposed in this case, and its rationale for doing so, add an independent and powerful deterrent. The inadequate level of scrutiny accorded by the Eighth Circuit to an arbitrator's plainly excessive punitive damages award deprives parties of yet another Due Process Clause guarantee – the protection against arbitrary and excessive punitive damages awards. Other federal and state courts have taken various approaches to review of arbitral awards in general, and the enforcement of punitive damages awards in

particular, further threatening the certainty necessary to encouragement of the arbitration process.

Compounding the due process deprivations caused by the Eighth Circuit's opinion is the added threat to the policy favoring the expeditious and limited recovery of non-punitive damages under the FDCPA, which provided the original basis for Respondents' complaint in this case. *See, e.g.*, 15 U.S.C. § 1692k(a) (limiting the amount of damages to the amount of "actual damage sustained" and, in individual actions, "such additional damages as the court may allow, but not exceeding $1,000"); *Randolph v. IMBS, Inc.*, 368 F.3d 726, 728 (7th Cir. 2004) ("violations of the FDCPA generally lead to small penalties and never to punitive damages"). Each of these various errors in the court's opinion, and each ill effect stemming from those errors, is reason enough for this Court to grant review.

I. THE COURT SHOULD GRANT REVIEW TO DECIDE WHETHER THE EIGHTH CIRCUIT'S NOVEL AND UNEXPECTED READING OF MISSOURI LAW DEPRIVED PETITIONER OF "FAIR NOTICE" OF THE CONDUCT THAT WOULD SUBJECT IT TO PUNISHMENT, IN VIOLATION OF DUE PROCESS

"The Due Process Clause . . . prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. . . . The reason is that '[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.'" *State Farm*, 538 U.S. at 416-17 (quoting *Gore*, 517 U.S. at 564) (other citations omitted). "'Indeed, the point of due process—of the law in general—is to allow citizens to order their behavior.'" *State Farm*, 538 U.S. at 418 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting)).

The Eighth Circuit's decision to reinstate the 3000:1, $6 million punitive damage award based on a convoluted and novel reading of state law deprived EMC of constitutionally mandated fair notice of the conduct that could subject it to punishment, and warrants this Court's review.

A. The Eighth Circuit's Decision Represents A Novel And Unexpected Change in Missouri Law That Contradicts The Eighth Circuit's Own Prior Ruling On This Issue

Until the Eighth Circuit announced its unprecedented decision in this case, no state or federal court had held that Missouri law precluded parties to an arbitration agreement from expressly waiving the right to claim punitive damages in disputes arising out of a contractual relationship. The Eighth Circuit itself has recognized this fact. *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 681-82 (8th Cir. 2001).

1. The only case directly cited by the Eighth Circuit in support of its novel holding was *Alack v. Vic Tanny International of Missouri, Inc.*, 923 S.W.2d 330 (Mo. 1996), but nothing in *Alack* supports, even in dicta, such a broad limitation on parties' freedom to contract and "to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479 (citation omitted). *Alack* dealt with the very different question of whether parties may waive their *liability* for entire "claims" or causes of action sounding in tort, rather than whether they could freely agree to limit or waive particular forms of relief that might be available under such claims. *Alack*, 923 S.W. 2d at 332, 337-38 (repeatedly referring to "claims" arising from the other party's negligence). In *Alack*, after all, the contract provision at issue "purport[ed] to shield Vic Tanny from liability for '**any** damages', '**any** . . . injuries' and '**any** and **all** claims, demands, damages, rights of action, present or future . . . resulting from or arising out of the Member's . . . use . . . of said gymnasium or the facilities and equipment thereof.'" *Id.* at 337 (emphases in original).

Read in context, then, the passage quoted by the Eighth Circuit from *Alack*—"there is no question that one may never exonerate oneself from future liability for intentional torts or for gross negligence, or for activities involving the public interest," Pet. App. 8a (quoting *Alack*, 923 S.W.2d at 337)—referred only to such wholesale attempts at exonerating oneself from *liability* for "any and all" "*claims*" of "negligence," "gross negligence," or "intentional tor[t]." 923 S.W.2d at 337. Even with respect to such attempts at exonerating oneself from all future *liability* for any and all *claims* sounding in tort arising from a contractual relationship, *Alack* held that such waivers of liability could be enforced if they were sufficiently "clear, unambiguous, unmistakable, and conspicuous." 923 S.W.2d at 337 ("The exculpatory language must effectively notify a party that he or she is releasing the other party from *claims* arising from the other party's own negligence.") (emphasis added); *id.* ("A contract that purports to relieve a party from *any and all claims* but does not actually do so is duplicitous, indistinct and uncertain.") (emphasis added). On the facts before it, the *Alack* Court held "that the exculpatory clause was ambiguous and [the] defendant health club did not insulate itself from *liability* for future negligence because the exculpatory clause did not use the word 'negligence' or 'fault' or their equivalents so that a clear and unmistakable waiver occurred." 923 S.W.2d at 332 (emphasis added).

2. All of the other authorities cited in support of the passage quoted by the Eighth Circuit from *Alack* also dealt with whether parties may waive their *liability* for entire "claims," rather than whether they could limit or waive particular *forms of relief* under such claims. Pet. App. 8a (citations omitted). In *Liberty Financial Management Corp. v. Beneficial Data Processing Corp.*, for example, the court upheld the contractual waiver of "*liability* for merely negligent failures to perform" the contract, distinguishing such a waiver from a waiver of liability for "willful or grossly negligent acts in violation of the contract." 670 S.W.2d 40, 47-48 (Mo. 1984) (emphasis added). Again, the court was not even contem-

plating a waiver of, or limitation on, particular kinds of relief (*e.g.*, punitive damages) that might be awardable for claims of simple negligence, gross negligence, intentional tort, or breach of contract.

Similarly, in 6A Corbin on Contracts, § 1472 (1962) and the current cumulative supplement, the Eighth Circuit's broad reading of limitations on the waiver of punitive damages finds no support. The treatise discusses and gives examples primarily of courts upholding or denying enforcement of contractual provisions that purport to exempt a party from all *liability* for entire *claims* or causes of action for negligence, gross negligence, or intentional tort. *See id.*; *see also* 57A Am. Jur. 2d Negligence §§ 49-67 (same); 76 C.J.S. Release §§ 63-67 (same); 4 Williston on Contracts § 602A (3d ed.) (same).

It is therefore unsurprising that the Eighth Circuit itself, in a published opinion in 2001—after the decision in *Alack*, stated that "Missouri courts have not suggested that it is improper for parties to include . . . terms [limiting the availability of punitive damages] in their [arbitration] contracts." *Gannon,* 262 F.3d at 681-82. And it is telling that the Eighth Circuit in its opinion in this case could not cite any cases actually holding, or even specifically suggesting, that punitive damages cannot be waived as a matter of Missouri law in agreements to arbitrate disputes arising out of a contractual relationship.

3. Indeed, even elsewhere in the Eighth Circuit, there do not appear to be any cases holding that express waivers of punitive damages in agreements to arbitrate disputes arising out of a contractual relationship are, as a *general* matter, unenforceable. Rather, most courts "recognize that there are differences between a contract which insulates a party from liability and one which merely places a limit upon that liability." *E.g.*, *Valhal Corp. v. Sullivan Associates*, 44 F.3d 195, 202 (3d Cir. 1995) (citing *DeFrancesco v. Western Pa. Water Co.*, 478 A.2d 1295, 1306 (Pa. 1984); *Posttape Assocs. v.*

Eastman Kodak Co., 537 F.2d 751, 755 (3d Cir. 1976) ("The difference between the two clauses 'is . . . a real one.'")).

B. The Eighth Circuit's Decision Raises Important And Substantial Issues Regarding Fair Notice And Retroactive Punishment In The Arbitration Context

The plain language of the arbitration agreement leaves no question that the parties intended to waive punitive damages. Even assuming *arguendo* that Respondents and EMC's predecessor intended to incorporate whatever state-law restrictions might have existed on the waivability of punitive damages when they appended "to the fullest extent permitted by law" to their express waiver provision,[3] neither EMC's predecessor nor anyone in its position could have reasonably known that such restrictions included a supposed (and hitherto unidentified) Missouri-law restriction on the waivability of punitive damages. Consequently, EMC and its predecessor were deprived of the fair notice to which they were constitutionally entitled that a court, in enforcing an arbitral award of damages, could subject them to a severe punishment in the form of punitive damages.

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[3] Of course, this assumption is wholly implausible, particularly given that the parties explicitly contracted for the arbitration to be governed by the contract's terms, the FAA, and the rules of the American Arbitration Association. This Court rejected a similar notion in *Mastrobuono*. *See* 514 U.S. at 63 ("As a practical matter, it seems unlikely that petitioners were actually aware of New York's bifurcated approach to punitive damages," under which courts, but not arbitrators, could award punitive damages, when they agreed to the New York choice-of-law clause in their arbitration contract). Here, the notion that the parties were aware punitive damages could be awarded under their arbitration agreement is even more implausible, because, unlike *Mastrobuono*, the parties did expressly refer to punitive damages in their arbitration contract. *Compare Mastrobuono*, 514 U.S. at 59 ("The [arbitration] agreement contains no express reference to claims for punitive damages.").

1. This Court has repeatedly articulated the need for, and importance of, such fair notice in the context of punitive damage awards, which "pose an acute danger of arbitrary deprivation of property":

> The Due Process Clause . . . prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. *Cooper Industries[, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424,] 433 [(2001)]; [*BMW of North America, Inc. v.] Gore*, 517 U.S. [559,] 562 [(1996)]. . . . The reason is that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.* at 574. . . .
>
> . . .
>
> Although [punitive damage] awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damages systems are administered.

State Farm, 538 U.S. at 416-17 (citations omitted).

That is why this Court both in *State Farm* and *Cooper Industries* mandated "[e]xacting appellate review" to "ensur[e] that an award of punitive damages is based upon an '"application of law, rather than a decisionmaker's caprice."'" *State Farm*, 538 U.S. at 418 (quoting *Cooper Industries*, 532 U.S. at 436)).

The Eighth Circuit's decision to reinstate the 3000:1, $6 million punitive damage award deprived EMC of fair notice. No one who had signed an arbitration agreement excluding punitive damages could have reasonably expected that its conduct could result in such a punishment. The Eighth Cir-

cuit had to contort and remake Missouri law and ignore its own prior decision in *Gannon* to reach this result.

2. The Eighth Circuit's imposition of punitive damages without fair notice raises retroactivity and due process concerns that have long been the focus of the precedents of this Court and other courts since at least the founding of the Republic. *See, e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) ("the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted").

Specifically,

> [r]etroactive imposition of punitive damages would raise a serious constitutional question. See *Turner Elkhorn*, 428 U.S. at 17 (Court would "hesitate to approve the retrospective imposition of liability on any theory of deterrence . . . or blameworthiness"); *De Veau v. Braisted*, 363 U.S. 144, 160 (1960) ("The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts"). See also *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 972 (CA2 1985) (retroactive application of punitive treble damages provisions of Trademark Counterfeiting Act of 1984 "would present a potential *ex post facto* problem").

Landgraf, 511 U.S. at 281.

Such retroactivity and due process concerns are particularly heightened where, as here, the Eighth Circuit's novel extension of state law completely scuttles the parties' settled expectations, embodied in their express agreement that punitive damages would not be awardable in any dispute arising out of their contractual relationship. Such settled expectations take on an added dimension where, as here, they are grounded in contract. *Cf., e.g.*, *Landgraf*, 511 U.S. at 271

("The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance.") (citing cases); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828-29 (1986) (characterizing appellant's argument "that the retrospective imposition of punitive damages under a new cause of action violates its rights under the Contracts Clause" as an "important issu[e] which, in an appropriate setting, must be resolved").

In sum, the Eighth Circuit's reliance on an unforeseeable and unprecedented reading of state law to void the parties' express waiver of punitive damages in this case contravenes the very principle of fair notice that has always been at the core of the Due Process Clause and warrants this Court's review. This Court should grant the petition to address this important due process issue regarding the interplay between arbitration and punitive damages.

II. THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT THE DUE PROCESS CLAUSE ESTABLISHES LIMITS ON THE SIZE OF PUNITIVE DAMAGE AWARDS IMPOSED BY ARBITRATORS

This Court should also grant review to decide whether an arbitrator who inflicts a punitive damage award that on its face violates the due process limits established by this Court in *State Farm* and *Gore* has, by definition, manifestly disregarded the law. The Eighth Circuit, like several other Circuits, essentially exempted arbitral punishments from due process scrutiny – a far-reaching and harmful proposition that contradicts at least three important and longstanding federal policies. First, of course, this Court has repeatedly expressed concerns about the dangers of unlimited punitive damages and has imposed due process limits on such awards. *State Farm*, 538 U.S. at 417. Second, this Court's precedents under the Federal Arbitration Act have long promoted the federal policy favoring arbitration, and underscored the corollary

principle that parties should be able to rely with certainty on the limits of arbitration and arbitrators' powers. *See, e.g.*, *Volt*, 489 U.S. at 476, 479. Third, the Fair Debt Collection Practices Act aims to provide expeditious and limited recovery of damages to debtors deserving relief. *See, e.g.*, 15 U.S.C. § 1692k(a) (limiting the amount of damages recoverable under the FDCPA to the amount of "actual damage sustained" and, in individual actions, "such additional damages as the court may allow, but not exceeding $1,000"); *Randolph v. IMBS, Inc.*, 368 F.3d 726, 728 (7th Cir. 2004) ("violations of the FDCPA generally lead to small penalties and never to punitive damages").

The Eighth Circuit's approach in this case undermines the strong federal policy favoring arbitration and encouraging parties to agree to arbitrate their disputes. Indeed, if parties cannot, with reasonable certainty, contract to prohibit punitive damages in arbitration, and cannot be assured of any semblance of due process review of massive punitive damage awards imposed by arbitrators, they have every incentive to avoid arbitration and resolve their disputes in court instead. This is an issue of nationwide importance that deserves the attention of this Court.

1. The facial invalidity of the arbitral award of punitive damages in this case is not even a close call, under this Court's precedents in *State Farm*, *Cooper Industries*, and *BMW v. Gore*. It bears repeating that the sole basis for the award of punitive damages in this case was the posting of the sign in the front window of Respondents' vacant house by a property-preservation company retained by EMC. *See supra*, at 3. The facial invalidity of the punitive damage award here is readily apparent from even a cursory application of the "three guideposts" established by this Court in *Gore* and *State Farm*: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or

imposed in comparable cases." *State Farm*, 538 U.S. at 418 (citing *Gore*, 517 U.S. at 575).

First, in assessing the "degree of reprehensibility," it is noteworthy that the allegedly tortious conduct did not "evinc[e] an indifference to or a reckless disregard of the health or safety of others." *State Farm*, 538 U.S. at 419 (citing *Gore*, 517 U.S. at 576-77). The house was vacant, after all. Moreover, there was no evidence showing that the sign-posting "was the result of intentional malice, trickery, or deceit." *Id.* If anything, it was a prudent measure taken by EMC in carrying out its contractual responsibility to secure the premises. Nor was the sign-posting violent or "repeated"; rather, it "was an isolated incident." *Id.*

Second, as for "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award," little more need be said than that the ratio here is 3000:1 ($6 million in punitive damages based on $2,000 in actual damages). As this Court made clear in *State Farm*, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 U.S. at 425 (citations omitted). Ratios in excess of 9:1 are unconstitutional except in the rarest of cases where, as is not the case here, the conduct complained of is exceptionally reprehensible or egregious and the compensatory damages are inadequate. *See id.* This Court in *State Farm* noted that it had previously suggested in two prior cases that a 4:1 ratio "might be close to the line of constitutional impropriety." *Id.* (citations omitted). Indeed, it explained in *State Farm* that legislatures have historically authorized sanctions providing for double (1:1), triple (2:1), or quadruple (3:1) damages, and these traditional ratios, while not "binding," are "instructive" for purposes of the *Gore* analysis. *Id.* Oftentimes, even a 1:1 ratio "can reach the outermost limit of the due process guarantee." *Id.* Here, the 3000:1 ratio clearly reaches far beyond this outermost limit prescribed by the Constitution. Insofar as the Eighth Circuit and the arbitrator were swayed by EMC's alleged wealth, *see, e.g.*, Pet. App. 13a, 28a-29a, their analysis was

further tainted by improper considerations. *See, e.g., State Farm*, 538 U.S. at 427 ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.").

Third, the "disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases'" is marked here. *Id.* at 428 (citing *Gore*, 517 U.S. at 575). The maximum fine that could have been imposed for the conduct in this case is $2,000. Mo. Rev. Stat. §§ 569.140 (first degree trespass is a class B misdemeanor), 569.150 (second degree trespass is an infraction), 569.021 (maximum penalty against a corporation for a class B misdemeanor is $2,000, and $500 for an infraction). (Even felonies by corporations carry a maximum penalty of only $10,000. Mo. Rev. Stat. § 569.021.) Indeed, the FDCPA (which does not authorize punitive damages awards, *see supra*, at 19), sets the maximum penalty in individual actions as "additional damages" of $1,000 over and above "actual damage[s]," and the maximum penalty in class actions is $500,000. *See* 15 U.S.C. § 1692k(a)(1)-(2). Here, again, $6,000,000 in punitive damages was awarded, dwarfing any of these comparable penalty amounts prescribed by Missouri and federal law.

Finally, it bears noting, again, that neither EMC nor its predecessor was on fair notice that punitive damages in *any* amount could be awarded in this case. *See supra*, at 11-15.

2. The Eighth Circuit nonetheless brushed aside all relevant factors for assessing the constitutionality of a punitive damages award, relying on the general rule that arbitral awards receive only a minimal degree of judicial scrutiny. *See, e.g., supra*, at 7-8 ("'[A]n arbitration decision only manifests disregard for the law where *the arbitrators clearly identify the applicable, governing law and then proceed to ignore it.*'"); *id.* ("'A party seeking vacatur [based on manifest disregard of the law] bears the burden of proving that the arbitrators were fully aware of the existence of a clearly defined governing legal principle, but refused to apply it, in ef-

fect, ignoring it.'"); *see also* Pet. App. 11a-12a ("Because '[a]rbitrators are not required to elaborate their reasoning supporting an award,' . . . '[i]f they choose not to do so, it is all but impossible to determine whether they acted with manifest disregard for the law.'") (quoting *Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000)).[4]

The sum total of the Eighth Circuit's *BMW v. Gore* due process analysis in this case is as follows:

> [I]t is apparent the arbitrator did not disregard governing law. The arbitrator's award was intended to punish EMC and to deter others from similar conduct. In arriving at the appropriate amount, the arbitrator specifically found the $6,000,000 award (amounting to one-tenth of one percent of shareholder equity) was "not great punishment but it should act as a deterence [sic]." Appellee's app. at 18; *see also Barnett v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639, 655 (Mo. App. 1998) (holding under Missouri law the net worth of a defendant is relevant when determining the extent of punitive damages necessary to punish and deter the defendant).

Pet. App. 13a.

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[4] As noted above, the Eighth Circuit concluded that this Court's decision in *State Farm* was irrelevant because it post-dated the arbitrator's ruling, and thus could not have been cited to or identified by him. *See supra*, at 8; *but see Landgraf*, 511 U.S. at 264 (referring to "the rule that 'a court is to apply the law in effect at the time it renders its decision'" (quoting *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974)); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (Marshall, C.J.) ("if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied"). This Court made clear in *State Farm*, however, that its decision followed from and clarified extant law set forth in *BMW v. Gore*, *Cooper Industries*, and other cases. *See, e.g.*, *State Farm*, 538 U.S. at 416-19.

The Eighth Circuit's manner of applying the standard for review of arbitral awards is wholly incapable of protecting against a punitive damages award that violates due process. Presumably all punitive damage awards (even unconstitutionally excessive ones) are "intended to punish" the tortfeasor and "to deter others from similar conduct." The Eighth Circuit's reliance on EMC's alleged net worth also fails to redeem its *Gore* analysis, because such reliance is illegitimate for purposes of a proper application of the Due Process Clause's protection against arbitrary and excessive punitive damage awards. In *Gore,* the Court declared: "The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, its status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce." 517 U.S. at 585.

Likewise, the Court in *State Farm* recognized that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award," and explained that wealth "bear[s] no relation to the award's reasonableness or proportionality to the harm." 538 U.S. at 427. Rather, wealth "'provides an open-ended basis for inflating awards when the defendant is wealthy.'" *Id.* at 427-28 (quoting *Gore*, 517 U.S. at 591 (Breyer, J., concurring)).

The kind of minimalist and vacuous judicial scrutiny of arbitral awards of punitive damages undertaken and authorized by the Eighth Circuit in this case underscores the pressing need for review by this Court.

3. The case law outside the Eighth Circuit on review of arbitral punitive damages awards offers little hope that this issue will be clarified absent this Court's intervention. Many cases go so far as to hold—erroneously—that there is no judicial scrutiny of arbitral awards of punitive damages at all, because no state action is supposedly involved, even though the arbitral award itself is meaningless absent state action in

the form of a court order enforcing and compelling compliance with the award. Other cases so hold because the parties supposedly submitted voluntarily to the resolution of their dispute by an arbitrator. *See, e.g.*, *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 940 (10th Cir. 2001) (citations omitted); *Gallus Invs., L.P. v. Pudgie's Famous Chicken, Ltd.*, 134 F.3d 231, 234 (4th Cir. 1998); *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1191-92 (11th Cir. 1995); *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1063-64 (9th Cir. 1991); *Porush v. Lemire*, 6 F. Supp. 2d 178, 186 (E.D.N.Y. 1998); *Rifkind & Sterling, Inc. v. Rifkind*, 28 Cal. App. 4th 1282, 1284, 1291 (1994).

Other courts, as was the case here, call for varying degrees of minimal scrutiny under the "manifest disregard of the law" standard.[5] *See, e.g.*, *Barnes v. Logan*, 122 F.3d 820, 824 (9th Cir. 1997); *but see Sawtelle v. Waddell & Reed, Inc.*, 754 N.Y.S.2d 264, 270 (N.Y. App. Div. 2003) ("A grossly excessive award that is arbitrary and irrational under

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[5] Although not explicitly provided for in the statutory grounds for vacatur of an arbitral award set forth in the FAA, 9 U.S.C. § 10, the "manifest disregard of the law" ground for vacating arbitral awards is now commonly accepted. The phrase appears to originate from the following dicta in this Court's decision in *Wilko v. Swan*: "In unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation." 346 U.S. 427, 436-37 (1953) (emphasis added) (footnote and citations omitted), *overruled on other grounds, Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989). *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) ("The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances. See, *e.g.*, 9 U.S.C. § 10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers); *Wilko v. Swan*, 346 U.S. 427, 436-437 (1953) (parties bound by arbitrator's decision not in "manifest disregard" of the law), overruled on other grounds, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).").

Gore should be equally arbitrary and irrational under the FAA.").

4. This Court should grant review and make clear that when an arbitrator imposes a punitive damages award that flatly violates this Court's due process guideposts, it *ipso facto* has manifestly disregarded the law. Such a conclusion is required given dangers posed by punitive damages and the "[e]xacting appellate review" called for by this Court in *State Farm* to "ensur[e] that an award of punitive damages is based upon an 'application of law, rather than a decisionmaker's caprice.'" *State Farm*, 538 U.S. at 417-18.

The need for this Court to declare enforcement of such awards a violation of the manifest disregard standard is particularly warranted where, as here, the contracting parties agreed to an express limitation on the power of the arbitrator to award punitive damages. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995) (noting "the significance of having arbitrators decide the scope of their own powers") (citing Cox, Reflections Upon Labor Arbitration, 72 HARV. L. REV. 1482, 1508-09 (1959)); *Matteson v. Ryder Sys. Inc.*, 99 F.3d 108, 113 n.6 (3d Cir. 1996) ("If arbitrators are given great deference as to the scope of their powers under a submission, then not only will arbitrators have virtually unreviewable authority over the interpretation of the collective bargaining agreement but they will also have such authority over the very limits of their power.").

5. At least two Circuits have applied the "manifest disregard" standard in a manner that takes into consideration the importance of the rights at stake. *See, e.g., Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1478, 1486 (D.C. Cir. 1997) (explaining that "the resolution of statutory *or constitutional* issues is a primary responsibility of courts," in rigorously applying "manifest disregard of the law" scrutiny to the arbitral resolution of statutory rights in that case) (emphasis added); *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998) (applying rigorous and thoroughgoing "manifest disregard of the law" scrutiny to the arbitral award at issue in that

case, because statutory rights under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, were also at stake); *see also Chisholm v. Kidder, Peabody Asset Mgmt., Inc.*, 966 F. Supp. 218, 226 (S.D.N.Y. 1997) ("Judge Edwards has written a long and thoughtful opinion in the *Cole* case advocating that the term manifest disregard be interpreted to involve more substantial judicial oversight in claims raised under the ADEA.") (citation omitted); *but see The GMS Group, LLC v. Benderson*, 326 F.3d 75, 77 (2d Cir. 2003) (disagreeing that *Halligan* applied a greater level of scrutiny than the conventional "manifest disregard" standard).

If plain violations of important statutory rights by arbitrators warrant reversal under the manifest disregard standard, then *a fortiori* an arbitrator's denial of *constitutional* rights—particularly fundamental due process rights to be free from arbitrary deprivations of property—should be overturned.

Because, as noted above, state and federal courts have been unsuccessful in their efforts to devise a clear and consistent answer to the question, this Court should grant review to decide whether arbitral decisions that fly directly in the face of this Court's due process protections against excessive punitive damages awards must be reversed for "manifest disregard of the law." Fundamental due process principles established by *State Farm* and *Gore* forbid federal courts from enforcing punishments that plainly violate the Constitution.

CONCLUSION

Petitioner EMC was not afforded the fair notice to which it was constitutionally entitled when the Eighth Circuit relied on an unforeseeable and unprecedented reading of state law to overturn the parties' settled expectation and express agreement that punitive damages could not be awarded by the arbitrator. Moreover, the three longstanding federal policies favoring arbitration, protection against arbitrary and excessive awards of punitive damages, and the expeditious and limited recovery of damages under the FDCPA would be unduly undermined by enforcing arbitral awards of punitive damages that plainly exceed the limits of the Due Process Clause.

This Court should therefore grant the petition for a writ of certiorari.

Respectfully submitted.

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February 2, 2005

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-2366

Stanley William Stark; Patricia Garnet Stark	*	
Plaintiffs - Appellants,	*	Appeal from the United States District Court for the Western District of Missouri
vs.	*	
Sandberg, Phoenix & von Gontard, P.C.; Scott Greenberg; EMC Mortgage Corporation; SpvG Trustee,	*	
Defendants - Appellees.	*	

Submitted: January 15, 2004
Filed: August 26, 2004

Before BYE, HEANEY and SMITH, Circuit Judges.

BYE, Circuit Judge.

Stanley and Patricia Stark appeal the district court's order vacating in part an arbitration award granting them punitive damages. We reverse.

I

Stanley and Patricia are husband and wife and live near Kansas City, Missouri. In 1999, in hopes of shoring up a failing business, the Starks borrowed $56,900 against their home and secured the loan with a mortgage. Despite the infusion of funds, the business failed and in April 2000 the Starks petitioned for bankruptcy protection. At about the same time, the Starks' lender sold the note, which was in default, to EMC Mortgage Corporation making EMC a debt collector under the provisions of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692o. In anticipation of foreclosure, the Starks vacated the home and moved into an apartment across the street. The Starks, however, remained in possession of legal title and did not abandon the home. In June 2000, EMC's motion to lift the automatic stay was granted and it proceeded with foreclosure.

The Starks were represented throughout the foreclosure and bankruptcy proceedings by attorney Roy True who notified EMC's attorney, Scott Greenberg of Sandberg, Phoenix & von Gontard, P.C., that his representation of the Starks extended beyond the bankruptcy proceedings. Between October 2000 and March 2001, despite letters from True advising EMC he represented the Starks and not to contact them directly, EMC tried several times to deal directly with the Starks. In April 2001, the Starks filed suit against EMC and its attorneys alleging violations of the FDCPA.

EMC moved to compel arbitration as required by the parties' loan agreement, and the district court ordered the dispute submitted to arbitration. The order compelling arbitration is not at issue in this appeal. During the pendency of

the arbitration, EMC's agent, without the Starks' consent, forcibly entered the home and posted a sign in the front window indicating the "Property has been secured and winterized. Not for sale or rent. In case of emergency call 1st American (732) 363-3626." The agent then contacted Mrs. Stark at her apartment, and EMC contacted Mr. Stark at work regarding the matter. Further, on November 5, 2001 and January 27, 2002, EMC wrote to the Starks directly regarding insurance coverage on the home. In total, the Starks testified EMC contacted them by mail, telephone or in person at least ten times after being advised they were represented by counsel.

After these incidents, the Starks moved to amend their complaint to include claims alleging intentional torts against EMC and seeking punitive damages. EMC opposed the motion arguing the arbitration agreement expressly precluded an award of punitive damages. The Starks contended the limitation on punitive damages was unconscionable and unenforceable. After extensive briefing, the arbitrator concluded the limitation was ambiguous and construed the language against EMC. The arbitrator noted the agreement purported to grant him "all powers provided by law" and then purported to deny the power to award "punitive . . . damages . . . as to which borrower and lender expressly waive any right to claim to the fullest extent permitted by law." The arbitrator concluded,

> In at least three places the Stark's [sic] are promised that they can seek all damages allowed by law, and then that promise is taken away. This is the keystone of an ambiguous contract, and the Agreement is to be interpreted in their favor. As a matter of law they are not prohibited from seeking punitive damages from EMC.

Appellee's app. at 22.

The arbitrator found EMC violated the FDCPA and awarded the Starks $1000 each in statutory damages, $1000 each in actual damages, $22,780 in attorneys fees, and $9300 for the cost of the arbitration. The arbitrator found EMC's forcible entry into the premises. "reprehensible and outrageous and in total disregard of plaintiff's [sic] legal rights" and awarded $6,000,000 in punitive damages against EMC. *Id.* app. at 17.[1]

The Starks moved to confirm the award, and EMC moved to vacate the punitive damages award arguing the arbitration agreement expressly prohibited punitive damages. No other aspect of the award was challenged. The district court vacated the award of punitive damages, holding the agreement was unambiguous and not susceptible to the arbitrator's interpretation.

On appeal, the Starks contend the arbitrator acted within his authority in construing the contract and his finding of an ambiguity was not irrational. EMC argues the district court's order vacating the award of punitive damages should be affirmed.

II

When reviewing a district court's order confirming or vacating an arbitral award, the court's findings of fact are reviewed for clear error and questions of law are reviewed de novo. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S.

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[1] The arbitrator indicated the award of punitive damages was calculated as one percent of EMC's shareholder equity. One percent of equity, however, would have resulted in an award of $60,000,000. The arbitrator later clarified this mistake indicating it was his intent to award $6,000,000. Thus, the award was actually calculated as one-tenth of one percent of shareholder equity.

938, 947-48 (1995); *Titan Wheel Corp. of Iowa v. Local 2048, Int'l Ass'n of Machinists & Aerospace Workers*, 253 F.3d 1118, 1119 (8th Cir. 2001).

When reviewing an arbitral award, courts accord "an extraordinary level of deference" to the underlying award itself, *Keebler Co. v. Milk Drivers & Dairy Employees Union, Local No. 471*, 80 F.3d 284, 287 (8th Cir. 1996), because federal courts are not authorized to reconsider the merits of an arbitral award "even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." *Bureau of Engraving, Inc. v. Graphic Communication Int'l Union, Local 1B*, 284 F.3d 821, 824 (8th Cir. 2002) (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987)). Indeed, an award must be confirmed even if a court is convinced the arbitrator committed a serious error, so "long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority." *Bureau of Engraving*, 284 F.3d at 824 (quoting *Misco*, 484 U.S. at 38).

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, established "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Thus, the FAA only allows a district court to vacate an arbitration award

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by

> which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

Similarly, under 9 U.S.C. § 11 a reviewing court may only modify the arbitrator's award

> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

9 U.S.C. § 11.

A "district court must take the award as it finds it and either vacate the entire award using section 10 or modify the award using section 11." *Legion Ins. Co. v. VCW, Inc.*, 198 F.3d 718, 721 (8th Cir. 1999). The deference owed to arbitration awards, however, "is not the equivalent of a grant of limitless power," *Leed Architectural Prods., Inc. v. United Steelworkers of Am., Local 6674*, 916 F.2d 63, 65 (2d Cir. 1990), and "courts are neither entitled nor encouraged simply to 'rubber stamp' the interpretations and decisions of arbitrators." *Matteson v. Ryder Sys. Inc.*, 99 F.3d 108, 113 (3d Cir. 1996). Thus, courts may also vacate arbitral awards which are "completely irrational" or "evidence[] a manifest disre-

gard for the law." *Hoffman v. Cargill Inc.*, 236 F.3d 458, 461 (8th Cir. 2001) (internal quotations and citations omitted).

An award is "irrational where it fails to draw its essence from the agreement" or it "manifests disregard for the law where the arbitrators clearly identify the applicable, governing law and then proceed to ignore it." *Id.* at 461-62. "An arbitrator's award draws its essence from the [parties' agreement] as long as it is derived from the agreement, viewed in light of its language, its context, and any other indicia of the parties' intention." *Johnson Controls, Inc., Sys. & Servs. Div. v. United Ass'n of Journeymen*, 39 F.3d 821, 825 (7th Cir. 1994) (internal quotations omitted).

Faced with these limitations on a court's ability to review arbitration awards, EMC argues the arbitrator's award of punitive damages was properly vacated under § 10 because the arbitrator exceeded his powers by modifying the unambiguous agreement, and properly modified under § 11 because in considering the issue of punitive damages the arbitrator made a decision on a matter not submitted to him.[2] EMC also argues the arbitrator's finding of an ambiguity was irrational and without foundation in reason or fact because the clear language of the agreement precludes an award of punitive damages. Finally, EMC argues the award of punitive damages was excessive and made in manifest disregard of the law. Because we conclude the arbitration agreement unambiguously *permitted* the award of punitive damages, we hold the award of punitive damages was proper and reverse the district court.

---

[2] EMC's § 11 argument is clearly without merit. The issue of punitive damages was submitted to the arbitrator. If the award was improper because it exceeded the scope of the agreement, § 10 is the proper avenue to redress the arbitrator's error.

III

The plain language of the arbitration agreement states the "borrower and lender expressly waive any right to claim [punitive damages] *to the fullest extent permitted by law*." Appellee's app. at 19 (emphasis added). Thus, the agreement only effected *a limited* waiver of punitive damages, that is, punitive damages were waived only if the governing law permitted such a waiver. Conversely, if the law did not permit the waiver of punitive damages, the arbitration agreement unambiguously preserved the right to claim them.

Under Missouri law "there is no question that one may never exonerate oneself from future liability for intentional torts or for gross negligence, or for activities involving the public interest." *Alack v. Vic Tanny Int'l of Mo., Inc.*, 923 S.W.2d 330, 337 (Mo. 1996) (citing *Liberty Fin. Mgmt. Corp. v. Beneficial Data Processing Corp.*, 670 S.W.2d 40, 48 (Mo. App. 1984) (in turn citing 6A Corbin on Contracts, § 1472 (1962)). An attempt to procure a waiver of punitive damages is an attempt to exonerate oneself from future liability for intentional torts or gross negligence, because the remedy of punitive damages would otherwise be available for such acts. Thus, Missouri law did not permit EMC to exonerate itself from liability for the intentional torts committed against the Starks by procuring the punitive damages waiver, and the arbitrator did not exceed his authority in awarding punitive damages.

We recognize the FAA allows parties to incorporate terms into arbitration agreements that are contrary to state law. *See UHC Mgmt. Co. v. Computer Sciences. Corp.*, 148 F.3d 992, 997 (8th Cir. 1998) (holding "[p]arties may choose to be governed by whatever rules they wish regarding how an arbitration itself will be conducted.") (citation omitted). Thus, had the parties to this agreement intended its interpretation to be governed solely by the FAA, the punitive damages waiver might have barred any such award. The plain

language of the agreement, however, makes it clear Missouri law applies to this issue.

The agreement's arbitration clause provides,

> **Arbitration**. To the extent allowed by *applicable law*, any Claim . . . shall be resolved by binding arbitration in accordance with (1) the Federal Arbitration Act, . . . (2) the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association . . . and (3) this Agreement.

Appellee's app. at 19 (emphasis added).

The agreement then defines applicable law as "the *laws of the state* in which the property which secures the Transaction is located." *Id.* (emphasis added). In other words, the agreement makes clear the parties intent to apply Missouri state substantive law while operating within the framework of the FAA, American Arbitration Association rules and the agreement. As previously noted, the punitive damages waiver expressly states the parties intended to waive punitive damages only to the extent permitted by Missouri law. Because Missouri law would not permit a waiver under the facts of this case, we hold the arbitrator's award of punitive damages was proper.

IV

Alternatively, while we believe the plain meaning of the agreement supports the award of punitive damages, we also conclude the arbitrator's finding of an ambiguity was not irrational.

The arbitration clause states any claims will be resolved in accordance with the FAA, which permits a waiver of punitive damages. The choice of laws provision, however, states claims must be resolved in accordance with "applicable [Missouri] law," which does not permit the waiver of puni-

tive damages argued for by EMC in this case. Thus, an arbitrator could reasonably conclude this agreement is ambiguous.

In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995), the Supreme Court considered the juxtaposition of a choice of laws provision prohibiting punitive damages with an arbitration clause permitting an award of punitive damages. The Court concluded "[a]t most, the choice-of-law clause *introduces an ambiguity into an arbitration agreement* that would otherwise allow punitive damages awards." *Id.* (Emphasis added). As in *Mastrobuono*, an arbitrator interpreting this agreement could reasonably conclude the apparent conflict between the arbitration clause and the choice of laws provision introduced an ambiguity into the agreement. Accordingly, the Supreme Court's recognition that an ambiguity is created when an agreement purports to be governed by conflicting state and federal law is instructive, and supports the arbitrator's finding of an ambiguity.

Additionally, we cannot ignore well-settled precedent from this court holding state contract law governs whether an arbitration agreement is ambiguous. *See Lyster v. Ryan's Family Steak Houses, Inc.*, 239 F.3d 943, 946 (8th Cir. 2001). Under Missouri law, "[t]he primary rule in the interpretation of a contract is to ascertain the intention of the parties and to give effect to that intention." *Speedie Food Mart, Inc. v. Taylor*, 809 S.W.2d 126, 129 (Mo. Ct. App. 1991). The test for determining if an ambiguity exists in a written contract is "whether the disputed language, in the context of the entire agreement, is reasonably susceptible of more than one construction giving the words their plain meaning as understood by a reasonable average person." *Speedie Food Mart*, 809 S.W.2d at 129.

In this case, EMC argues the exclusionary language is clear and unambiguous and shields it from liability for any award of punitive damages. When viewed in the context of

Missouri law governing exculpatory clauses, however, this clause could easily be viewed as ambiguous. "A 'latent ambiguity' arises where a writing on its face appears clear and unambiguous, but some collateral matter makes the meaning uncertain." *Royal Banks of Missouri v. Fridkin*, 819 S.W.2d 359, 362 (Mo. 1991) (en banc) (citation omitted). Here, the ambiguity arises because the clause attempts to effect a prospective waiver of rights which Missouri law holds may not be waived. Under Missouri law "there is no question that one may never exonerate oneself from future liability for intentional torts or for gross negligence, or for activities involving the public interest." *Alack*, 923 S.W.2d at 337 (citations omitted). Words purporting to waive claims which cannot be waived "demonstrate the ambiguity of the contractual language." *Id.*

Finally, EMC "cannot overcome the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." *Mastrobuono*, 514 U.S. at 62 (citations omitted). EMC "cannot now claim the benefit of the doubt. The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result." *Id.* at 63.

Accordingly, we conclude the arbitrator's finding that the contract was ambiguous was not irrational.

V

EMC next argues the award of punitive damages was properly vacated because it is excessive and exhibits a manifest disregard of the law. We disagree.

"Beyond the grounds for vacation provided in the FAA, an award will only be set aside where it is completely irrational or *evidences a manifest disregard for the law.*" *Hoffman*, 236 F.3d at 461 (internal citations and quotations omitted) (emphasis added). "These extra-statutory standards are extremely narrow: . . . [A]n arbitration decision only mani-

fests disregard for the law where *the arbitrators clearly identify the applicable, governing law and then proceed to ignore it.*" *Id.* at 461-62 (citing *Stroh Container Co. v. Delphi Indus.*, 783 F.2d 743, 749-50 (8th Cir. 1986)) (emphasis added).

"A party seeking vacatur [based on manifest disregard of the law] bears the burden of proving that the arbitrators were fully aware of the existence of a clearly defined governing legal principle, but refused to apply it, in effect, ignoring it." *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003). Because "[a]rbitrators are not required to elaborate their reasoning supporting an award," *El Dorado Sch. Dist. #15 v. Continental Cas. Co.*, 247 F.3d 843, 847 (8th Cir. 2001) (internal quotations omitted), "[i]f they choose not to do so, it is all but impossible to determine whether they acted with manifest disregard for the law. *W. Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000) (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995)).

Manifest disregard of the law "is more than a simple error in law or a failure by the arbitrators to understand or apply it; and, it is more than an erroneous interpretation of the law." *Duferco Int'l*, 333 F.3d at 389 (citations omitted). "Our disagreement with an arbitrator's interpretation of the law or determination of the facts is an insufficient basis for setting aside his award." *El Dorado Sch. Dist.*, 247 F.3d at 847 (citing *Hoffman*, 236 F.3d at 462).

In support of its claim, EMC argues the arbitrator disregarded the Supreme Court's pronouncements in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572-74 (1996) (describing a 500:1 ratio of punitive to compensatory damages as "breathtaking" and suspicious), and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003) (finding a 145:1 ratio of punitive to compensatory damages presumptively excessive). In so arguing, however, EMC has failed to

present any evidence that the arbitrator "clearly identif[ied] the applicable, governing law and then proceed[ed] to ignore it." *Hoffman*, 236 F.3d at 461-62 (citing *Stroh Container*, 783 F.2d at 749-50). None of the cases relied upon by EMC are cited in the arbitrator's decision,[3] and there is nothing in the record to demonstrate "one of the parties clearly stated the law and the arbitrator[] expressly chose not to follow it." *W. Dawahare*, 210 F.3d at 670; *see also Duferco Int'l*, 333 F.3d at 390 ("In determining an arbitrator's awareness of the law, we impute only knowledge of governing law identified by the parties to the arbitration.") (citation omitted).

Indeed, to the extent the arbitrator's decision sets forth the basis for the punitive damages award, it is apparent the arbitrator did not disregard governing law. The arbitrator's award was intended to punish EMC and to deter others from similar conduct. In arriving at the appropriate amount, the arbitrator specifically found the $6,000,000 award (amounting to one-tenth of one percent of shareholder equity) was "not great punishment but it should act as a deterence [sic]." Appellee's app. at 18; *see also Barnett v. La Societe Anonyme Turborneca France*, 963 S.W.2d 639, 655 (Mo. App. 1998) (holding under Missouri law the net worth of a defendant is relevant when determining the extent of punitive damages necessary to punish and deter the defendant). Accordingly, we reject EMC's claim of manifest disregard.

"Although this result may seem draconian, the rules of law limiting judicial review and the judicial process in the arbitration context are well established and the parties . . . can be presumed to have been well versed in the consequences of

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[3] The arbitrator's decision predates *State Farm* making it impossible for the arbitrator to have identified the decision as controlling.

their decision to resolve their disputes in this manner." *Stroh Container*, 783 F.2d at 751. Moreover, "[a]rbitration is not a perfect system of justice, nor it is [sic] designed to be." *Hoffman*, 236 F.3d at 462 (citation omitted). Rather, it "is designed primarily to avoid the complex, time-consuming and costly alternative of litigation." *Id.*

> In the arbitration setting we have almost none of the protections that fundamental fairness and due process require for the imposition of this form of punishment. Discovery is abbreviated if available at all. The rules of evidence are employed, if at all, in a very relaxed manner. The factfinders (here the panel) operate with almost none of the controls and safeguards [present in traditional litigation.]

Lee v. Chica, 983 F.2d 883, 889 (8th Cir. 1993) (Beam, J. concurring in part and dissenting in part).

Here, EMC chose to resolve this "dispute quickly and efficiently through arbitration." *Schoch v. Infousa, Inc.*, 341 F.3d 785, 791 (8th Cir. 2003), *cert. denied*, 124 S. Ct. 1414 (2004). Indeed, it was EMC that insisted on removing the matter to arbitration. In so doing, EMC "got exactly what it bargained for." *Id.* "Having entered such a contract, [EMC] must subsequently abide by the rules to which it agreed." *Hoffman*, 236 F.3d at 463 (citation omitted).

VI

We reverse the district court's order vacating the award of punitive damages and remand with instructions to confirm the arbitrator's award in its entirety.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

STANLEY WILLIAM STARK and PATRICIA GARNET STARK,	)	
Plaintiffs,	)	
vs.	)	Case No. 01-0407-CV-W-3-ECF
SANDBERG, PHOENIX & VON GONTARD, P.C. *et al.*,	)	
Defendants.	)	

AMENDED ORDER CONFIRMING IN PART AND VACATING IN PART ARBITRATOR'S AWARD[1]

On January 23, 1999, Plaintiffs Stanley and Patricia Stark (the "Starks") borrowed $56,900 from United Companies Lending Corporation ("United") and executed a Promissory Note ("Note") in connection with the loan. The Note

[1] The only differences between this Amended Order and the Order issued on May 5, 2003, involve the correction of the monetary amounts awarded by the arbitrator. The May 5 Order misstated the amount awarded in two respects.

was secured by a Deed of Trust that encumbers the Stark's home. The Deed of Trust contained an agreement to mediate or arbitrate. The Starks also executed a separate Acknowledgment and Agreement to Mediate or Arbitrate, the terms of which are identical to those contained in the Deed of Trust. The Note was eventually assigned to EMC Mortgage Corporation ("EMC"), and SPvG Trustee, Inc. ("SPvG") was named successor trustee. EMC alleged that Plaintiffs defaulted in meeting their obligations under the Note and Deed of Trust. EMC retained the law firm of Sandberg, Phoenix & von Gontard, P.C., to pursue collection, and Scott Greenberg of that law firm represented EMC for this purpose.

On May 25, 2001, Plaintiffs sued EMC, SPvG, the law firm and Greenberg (collectively "Defendants"); the Amended Complaint seeks actual and statutory damages for alleged violations of the Fair Debt Collection Practices Act ("FDCPA") and the Truth in Lending Act ("TILA"). The Amended Complaint also alleged that the Starks rescinded this transaction (and were entitled to damages) in light of violations of the Home Ownership and Equity Protection Act of 1994 ("HOEPA"); however, Plaintiffs sought and received leave to dismiss their HOEPA claims. *See* Order dated July 23, 2001.

On August 17, 2001, the Court granted Defendants' Motion to Compel Arbitration. The hearing was held in late August 2002, and on September 9, 2002 the arbitrator issued a Declaration of Law and Limited Findings of Fact which addressed only two issues: whether Plaintiffs could seek punitive damages, and whether they had made a submissible case for punitive damages. The arbitrator answered both questions in the affirmative (the latter answer applying only to EMC), directed EMC to provide financial information to Plaintiffs' attorney, and set a time for the hearing to reconvene. On November 25, 2002, the Arbitrator issued his final decision and determined (1) each Plaintiff was entitled to

$1,000.00 in statutory damages and $1,000 for actual damages, with EMC and the law firm being jointly and severally liable, (2) Plaintiffs were entitled to attorney fees in the amount of $22,780.00, to be paid by EMC, (3) EMC was to pay punitive damages in the amount of $6 million, and (4) EMC was to pay the Arbitrator's fee and all costs. SPvG was discharged, there being no finding of liability against it. On November 29, the Arbitrator issued an Addendum similarly discharging Greenberg.

Plaintiffs and EMC have filed a multitude of pleadings addressing the award of punitive damages; no other aspect of the Arbitrator's decision is challenged. Plaintiffs argue the amount should be increased or the matter remanded to the Arbitrator for clarification;[2] EMC argues the award of punitive damages should be vacated because the arbitration agreement forbids an award of punitive damages. None of the Arbitrator's other decisions are contested. The Court agrees with EMC and confirms the Arbitrator's award in its entirety except for the award of punitive damages, which is vacated. In a paragraph entitled "Arbitration," the parties' agreement states

> To the extent allowed by applicable law, any Claim . . . shall be resolved by binding arbitration in accordance with (1) the Federal Arbi-

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[2] Contrary to EMC's argument, Plaintiffs' argument about the ambiguity in the calculation of punitive damages appears valid. The Arbitrator indicated that his award was "one percent of shareholders' equity," but the figures recited by the Arbitrator indicated that this calculation would have resulted in an award of $60 million. Whether the Arbitrator meant to award the number he cited or the actual product of his calculation is unclear, and would likely require further input from the Arbitrator to be resolved.

> tration Act, 9 U.S.C. §§ 1-9; (2) the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association (the "Arbitration Rules") then in effect; and (3) this Agreement. If the terms of this Agreement and the Arbitration Rules are inconsistent, the terms of this Agreement shall control. . . . The parties agree that the arbitrator shall have all powers provided by law, this Agreement, and the Loan Agreements. However, the arbitrator shall have no power to vary or modify any of the provisions of the Loan Agreements.

In an entirely capitalized paragraph (which will not be capitalized herein), the agreement also states that "if the appointed arbitrator should award any damages, such damages shall be limited to actual and direct damages and shall in no event include consequential, punitive, exemplary or treble damages as to which borrower and lender expressly waive any right to claim to the fullest extent permitted by law." The Arbitrator concluded, and Plaintiffs argue, that these clauses are ambiguous. In his September 9 Declaration of Law and Limited Findings of Fact, the Arbitrator noted that neither state nor federal law forbids an arbitrator's award of punitive damages, nor do the rules of the American Arbitration Association. He thus characterized the parties' agreement as "promis[ing] that [Plaintiffs] can seek all damages allowed by law, and then that promise is taken away. This is the keystone of an ambiguous contract, and the Agreement is to be interpreted in [Plaintiffs'] favor."

The Court is mindful that the parties bargained for an arbitrator's decision, not a judicial decision, that deference is due to an arbitrator's interpretation of the parties' agreement, and that the grounds for vacating an award are quite narrow.

Nonetheless, this is a circumstance in which the award of punitive damages may, and must be, vacated.

In addition to the grounds identified in the Federal Arbitration Act, an award may be vacated if it is completely irrational or manifestly ignores the law. A decision is irrational if it fails to draw its essence from the agreement to arbitrate; this does not allow the Court to set the award "aside simply because we might have interpreted the agreement differently or because the arbitrators erred in interpreting the law or in determining the facts. Rather, the contract must not be susceptible of the arbitrator's interpretation." *Hoffman v. Cargill Inc.*, 236 F.3d 458, 462 (8th Cir. 2001); *see also Boise Cascade Corp. v. Paper Allied-Indus., Chemical and Energy Workers, Local 7-0159*, 309 F.3d 1075, 1081 (8th Cir. 2002) ("We may not vacate the award simply because we disagree with [the arbitrator's] interpretation, unless that interpretation so directly contradicts the plain meaning of the parties' agreement that it effectively rewrites it."); 9 U.S.C. § 10(a)(4).

After reviewing the documents in question, the Court respectfully disagrees with the Arbitrator's conclusion that the availability of punitive damages is ambiguous. The parties identified three sources of rules to govern their arbitral obligations, and declared that one – their written agreement – would govern in the event of any conflict between them. The parties also specifically agreed that the arbitrator could not award punitive damages. This is not amenable to an interpretation that punitive damages could be awarded, and the Court concludes the Arbitrator exceeded his authority in awarding them.[3]

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[3] The Arbitrator's award conveys his sense of outrage, which appears completely justified based on his findings regarding

[Footnote continued on next page]

Consequently, the Arbitrator's Award (as amended) is confirmed in part and vacated in part. Each Plaintiff is entitled to $2,000, this obligation to be borne jointly and severally by EMC and the law firm. EMC shall pay $22,780 in attorney fees as well as all costs and Arbitrator fees. SPvG and Scott Greenberg are dismissed. The award of punitive damages is vacated.

IT IS SO ORDERED.

/s/
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE: May 8, 2003

[Footnote continued from previous page]

EMC's conduct in this matter. Were it not for the Court's obligation to confine the scope of arbitration to matters the parties actually agreed to arbitrate, the punitive damage award (or some part of it) would stand.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-2366

Stanley William Stark, *et al.*,	*	
	*	
	*	
Appellants,	*	Order Denying Petition for Rehearing and for Rehearing En Banc
	*	
vs.	*	
	*	
Sandberg, Phoenix & von Gontard, P.C., *et al.*,	*	
	*	
	*	
Appellees.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Wollman, Judge Riley, and Judge Gruender would grant the petition for rehearing en banc.

(5128-010199)

November 5, 2004

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

DONALD L. MASON
409 West 68th Street,
Kansas City, Missouri 64113-1918
816-363-0149
dmason7@kc.rr.com

Arbitration & Mediation [SSN omitted]

September 9, 2002

ARBITRATOR'S DECLARATION OF LAW AND LIMITED FINDINGS OF FACT

By agreement of the parties the plaintiff's presented their evidence, with exceptions, at the hearing held on 8/29/02, after which the arbitrator would declare as a matter of law if the plaintiff's could seek punitive damages in light of the specific provision in the Arbitration Agreement that the Arbitrator could not award such damages, and whether the plaintiff's made a submissable case for such damages against any of the defendants.

I have studied Judge Smith's order to arbitrate, and the pleadings prompting that Order, and I do not find indication that either issue was presented, or ruled by Judge Smith.

The Agreement to Arbitrate and the Arbitration Agreement found in the Deed of Trust, noted by Judge Smith to be the same, is signed by EMC's predecessor and the Plaintiffs. The other defendants have agreed to be governed by Arbitration Agreement as agents of EMC.

The Agreement selects Missouri as the choice of laws. Missouri courts have repeatedly found favor with the statutory

Arbitration laws. On a preemption basis Missouri would be governed by the Federal Arbitration Act. Those laws do not prohibit the award of punitive damages.

The Agreement also states that the Rules of Arbitration of the American Arbitration Association shall prevail except where in conflict with the Agreement.

Punitive damages can be awarded in AAA cases.

The Agreement specifically states that the Arbitration cannot award punitive damages.

In at least three places the Stark's are promised that they can seek all damages allowed by law, and then that promise is taken away. This is the keystone of an ambiguous contract, and the Agreement is to be interpreted in their favor. As a matter of law they are not prohibited from seeking punitive damages from EMC.

From the evidence heard I make the limited finding of fact that the plaintiffs made a submissable case against EMC only, but not the other defendants, as agents of EMC.

The financial records of EMC requested shall be supplied to Mr. True within four business days of this order. The objection to the production by the other defendants is sustained and those records may be returned to the parties.

The arbitration hearing will reconvene at 10:00 a.m. on Thursday, September 26, 2002 at Mr. True's office. If this setting presents a conflict please advise. I suggest we complete plaintiff's case, then defendants evidence, then rebuttal and surrebuttal, if any.

Hopefully medical problems will not delay my final Award.

/s/
DONALD L. MASON, ARBITRATOR

All Attorneys
Judge Ortrie Smith, case no. 01-0407-CV-W-3-ECF

APPENDIX E

DONALD L. MASON
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816-363-0149
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Arbitration & Mediation [SSN omitted]

November 25, 2002

ARBITRATORS AWARD

I have considered, and perhaps identified, testimony and documentation which I consider pertinent to the issues submitted. As an expedient I will not recite all the facts in detail.

The plaintiffs, husband and wife, live in Holden a small community of about 3000 located southeast of Kansas City. They could be described as working class people, probably not educated beyond high school, and not very articulate. The house and real estate involved located at 205 North Vine was purchased by Mr. Stark's parents in 1951, sold, and then repurchased in 1958. The property was received by the plaintiffs in 1977 "as an inheritance after down payment". The plaintiff's resided in and raised their family in the house thereafter.

Sometime prior to 1999 the plaintiff's and their son started a photography business in Warrensburg, Mo. This business operated by the son incurred indebtedness for the purchase of equipment and other expenses. These expenses were paid by credit card, using assets from Mr. Stark's 401[k] plan at

work, and ordinary income. These business expenses became overwhelming causing the Stark's to borrow heavily from United Lending Corp, using their house as security. They signed a note in the amount of $56,900.00 in January, 1999, with a Deed of Trust. At that time the real estate had a value $50,000.00 with the appraised value of $60,000.00

This loan did not alleviate their financial problems as they filed a Petition in bankruptcy in April 2000, represented by Mr. Roy True. Near the same time United Lending was also engaged in bankruptcy proceedings. In July, 2000 EMC purchased 52,000 notes from United, including plaintiff's, which was then in default. EMC became a debt collector under FDCPA.

In May, 2000 Mr. Greenberg motioned the Court to lift the automatic stay, which was granted in June, 2000. In responding to this motion True raised issues which declared that his representation of the Stark's was beyond the parameters of the bankruptcy proceeding. The Stark's were discharged in bankruptcy in October, 2000.

The plaintiffs stated they were embarrassed, felt some worry, mental and marital strain about the bankruptcy and their financial future. Their business failure and bankruptcy was known to some members of the community. Mr. Stark felt that he had let the family down because he had "lost" the house.

On February 15, 2000 True wrote to United that he represented the Stark's and exerted recission of the note and HOEPA violations, issues beyond the normal parameters of bankruptcy court proceedings.

On October 13,2000 EMC acknowledged to Stark's the purchase of their note. On October 26, 2000 EMC sent another letter to plaintiffs concerning their indebtedness. On December 18,2000 EMC sent a Western Union letter to the plaintiff's. This last letter was acknowledged by True and told

them they should not contact his clients. On March 12, 2001 Greenberg sent "notice of acceleration" letter to Mr. Stark. On March 23.2001 Greenberg sent a "notice of foreclosure sale" to Mr. Stark. On March 22,2001 foreclosure publication was commenced but for reasons not given was discontinued and the foreclosure did not occur. To this date the Stark's remain the title owner of the real estate and improvements.

On April 12,2001 the instant case was filed and on March 15,2001 all defendants waives service of process and enter their appearances.

On June 3,2001 Sharla McDaniel, an acknowledged agent of EMC, without notice or consent, forcibly entered the house and posted a sign, in large letters, on the front room window stating "Property has been secured or winterize. Not for sale or rent. In case of emergency call 1st American 732 363-3626." Ms. McDaniel also contacted Mrs. Stark at her across the street apartment. Near this same time Mr. Stark was contacted at his work by another EMC employee. On November 5, 2001 EMC wrote the plaintiffs re. Insurance coverage. Ditto on January 27, 2002.

EMC offered the testimony of an employee as to the perils involved with vacant property. This was generalized testimony and none of those perils were attributed to the Stark property. Her testimony was not pertinent and deserves no further consideration. It was suggested that EMC agent forceably entered the house for protection purposes. This is not what the sign said. Even in a small town you don't protect a house by posting a sign. In fact this could advertise that the house is vacant and lead to vandalism or other perils.

The Stark's testified that the activities by EMC by correspondence and otherwise caused them physical and emotional discomfort. Of this I have not the slightest doubt even though medical attention was not required. They are entitled to minimal actual damages each of $1000.00 payable by

EMC. They also seek other actual damages for apartment rental, phone charges, etc. but I do not consider them true damages against any defendant.

The FDCPA was repeatedly violated by EMC. The facts will support more than I Identify, On February 15, 2000 Mr. True wrote United, EMC's assignor, that he represented the Stark's and asserted issues that clearly indicated that his representation extended to the note and indebtedness, and beyond the parameters of the bankruptcy proceedings. EMC received assignment in July,2000. In responsive pleadings to lift the automatic stay in May, 2000 made allegations that his representation included the note and the indebtedness. EMC and the law firm had actual knowledge the scope of True's representation. By law both EMC and the law firm were in the role of a debt collector. They continued to repeatedly contact the Stark's rather than their attorney. The letters of "acceleration" and "foreclosure" required by law should have been sent to True not to the plaintiff's. I am mindful that these letters were sent in the representation their client. On February 28, 2001 True wrote to EMC that he represented the Stark's. EMC continued to contact the Stark's, and continued to September, 2002.

The insurance letters of October, 2001 and January, 2002 were deceptive. They state that the insurance premium would be charged to the Stark's escrow account. EMC knew that the Stark's had not made a house payment for more than a year and a half and that they had been discharged from the debt obligation a year earlier.

The only point of interest between EMC and the Stark's was the note. It is obvious that EMC's activities were directed toward seeking payment or affirmation of the note.

The plaintiff's are entitled to statuary damages of $1000.00 each payable equally by the law firm and EMC. However the law firm was acting entirely in its representation of the

note holder and is entitled to indemnification and judgment over against EMC in the in the amount of $1000.00.

The plaintiff,s are also entitled to reasonable attorney's fees. Mr. True stated the hourly rate and the hourly rate of his paralegals. These hourly rates are not disputed. He submitted time sheets for himself and for his paralegals. These time sheets don't show the services performed. His total attorney fee claim is in excess of $34,000.00. I have no way of verifying this claimed amount In the absence of a record of services performed. In mentally reconstructing the time necessary to adequately provide the necessary legal services, and other criteria to be considered, I arrive at a reasonable attorney fee of $22, 780.00 to be paid by EMC.

It is a simple procedure to complete foreclosure. Why EMC did not do so is unexplained. Instead EMC forcefully entered the premises still in legal title with the Stark's and exercised dominion over the property. At the very least a misdemeanor trespass was committed. Although the Stark's had moved from the premises on the advice of counsel they had not abandoned the premises. I find this conduct reprehensible and outrageous and in total disregard of plaintiff's legal rights. They are entitled to punitive damages which are not precluded by the arbitration agreement which has been declared ambiguous. Pretrial True requested financial data of EMC. He was furnished financial data of the parent corporation, Bear, Stearns, with explanation that as a subsidiary EMC does not have separate financial records. The data entered in evidence was obtained by both parties from the Internet.

Even in this era of publicized corporate malfeasance and misfeasance I find it difficult to believe that the CEO and Board of Directors of a large publicly traded corporation [Bear, Sterns] would not have financial information on a wholly owned subsidiary. How are they going to assess the performance of the officers and managers of that subsidiary? I

will accept the information provided. That information does not identify the net worth of Bear, Sterns. It has total assets of $186,627,844,000.00. Stockholders equity is $5,963,258,000.00 with each of the 146,873,990 shares having a book value of $37.16.

Being mindful that the purpose of punitive damages is not to reward the plaintiff but to punish the defendant and to deter others from like conduct the plaintiff's are awarded punitive damages In the amount of $6,000,000.00. At one percent of shareholders equity this is not great punishment but it should act as a deference.

IT IS THEREFORE ORDERED that the plaintiffs shall each recover the sum $1,000.00 for actual damages from EMC. They each shall recover the sum $1,000.00 for statutory damages to be paid equally by Sandberg, Phoenix & von Gontard, P.C. and EMC. EMC shall indemnify and pay to the law firm the sum of $1,000.00. EMC shall pay to the plaintiffs as and for attorney fees the sum of $22,780.00. The plaintiffs shall have and recover from EMC the sum of $6,000,000.00 as and for punitive damages. Defendant SPvG Trustee, Inc. is discharged with its costs. The Arbitrator's fee, at the agreed hourly rate, is $9,300.00 to be paid by EMC, the non-prevailing party. All costs are assessed against EMC.

DONALD L. MASON
ARBITRATOR

/s/

Copy: All attorneys and Judge Ortrie Smith

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CHARLES EVANS WHITTAKER COURTHOUSE
400 EAST NINTH STREET, SUITE 8552
KANSAS CITY, MISSOURI 64106

Chambers of
Ortrie D. Smith
District Judge

(816) 512-5645
Facsimile
(816) 512-5658

May 9, 2003

Roy True
Attorney at Law
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Kansas City, MO 64114-1117

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Keith D. Price
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515 North Sixth Street
St. Louis, MO 63101-1880

Leonard Lyle Wagner
Robert Bruce Best, Jr.
Husch & Eppenberger, LLC
12000 Main St.
Suite 1700
Kansas City, MO 64105

Re: Stark v. Sandberg, Phoenix & von Gontard, P.C., *et al.*
Case No. 01-0407-CV-W-ODS

Gentlemen:

Enclosed please find a copy of a letter I received from Judge Mason addressing the amount of punitive damages he intended to award. I forward it for whatever value it may have in further proceedings.

Sincerely,

Ortrie D. Smith
United States District Judge

ODS/kh

Enclosure

MAY 9 2003

Donald L. Mason
409 West 68th Street,
Kansas City, Missouri 64113-1918
816-363-0149
dmason7@kc.rr.com

Arbitration & Mediation [SSN omitted]

May 8,2003

Honorable Ortrie Smith
Federal Courthouse
400 East Ninth Street,
Kansas City, Missouri 64106

Re: Stark v. Sandberg, Phoenix & von Gontard, P.C., *et al*

Dear Judge Smith;

This in response to fn 1 of your order and hopefully I am not out of order.

I intended to award $6 Million in punitive damages. The 1 one percent of shareholder value' was surplusage and demonstrates only my lack of mathematical skills. It also demonstrates that I did not seek calculator or paper computation. These errors created a false issue, for which I apologize.

At your sole discretion you may forward copies of this letter to all attorneys

Respectfully,

ARBITRATOR

ARBITRATION PROCEEDING UNDER FEDERAL ARBITRATION ACT

Stanley William Stark,	)
Patricia Garnet Stark,	)
	)
Claimants	)
	)
v.	)
	)
Sandberg, Phoenix & von Gontard	)
P.C.	)
Scott Greenberg	)
EMC Mortgage Corporation	)
SPvG, Inc.	)
	)
Respondents.	)

ORDER

The arbitrator heard argument of counsel and read suggestions submitted pertaining to Claimants' and Respondents' request for discovery and objections thereto.

It is therefore ordered that said respective objections are overruled and each side shall on or before August 12, 2002 submit to the other side the documents and information requested by discovery.

It is further ordered that the parties shall not disclose or further disseminate or distribute the documents provided and at the completion of the arbitration proceeding shall return all documents received form the other side including any copies and the information disclosed shall be used for this arbitration proceeding only.

It is further ordered Respondents' Motion to Dismiss punitive damage claims pretrial is overruled.

It is so ordered this July 25, 2002.

/s/
Donald L. Mason, Arbitrator

APPENDIX F

Relevant Statutory Provisions

Section 10(a) of the Federal Arbitration Act (FAA), ch. 392, 61 Stat. 672 (1947), **[as amended]** provides:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

Section 1692k(a) of the Fair Debt Collection Practices Act (FDCPA) provides:

(a) Amount of damages. Except as otherwise provided by this section, any debt collector who fails to comply with

any provision of this title with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of such failure;

(2) (A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or

(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

15 U.S.C. § 1692k(a).

APPENDIX G

Loan No: 035601007572 Data ID: 918
Borrower: STANLEY W. STARK

ACKNOWLEDGMENT AND AGREEMENT TO MEDIATE OR ARBITRATE

THIS ACKNOWLEDGMENT AND AGREEMENT TO MEDIATE OR ARBITRATE is made by and between undersigned Borrower ("Borrower") and UNITED COMPANIES LENDING CORPORATION® ("Lender").

At or before the execution of my Note and Security Instrument and all other instruments executed in conjunction with the Note and Security Instrument on property located at 205 N. VINE, HOLDEN, MISSOURI 64040 ("Property"), Borrower willingly and voluntarily acknowledges, covenants and agrees with Lender to the following:

I. AGREEMENT TO MEDIATE OR ARBITRATE

READ THIS AGREEMENT CAREFULLY. IT LIMITS CERTAIN OF YOUR RIGHTS, INCLUDING YOUR RIGHT TO GO TO COURT. In this agreement to mediate or arbitrate (the "Agreement"), (1) "Transaction" means any (a) payment of money, (b) transfer or exchange of property or any other thing of value, (c) any one or more past, present, or future extensions of, advertisement, solicitation, applications for, or inquiries about, credit, or forbearances of payment, such as a loan, a credit sale, or otherwise, from Lender or Borrower, including this Transaction, (d) gift, or (e) promise to enter into a Transaction, and (2) "Claim" means any case, controversy, dispute, tort, disagreement, lawsuit, claim, or counterclaim, and other matters in question

now or hereafter existing between Lender and Borrower. A Claim includes, without limitation, anything arising out of, in connection with, or relating to: (a) this Agreement; (b) to the advertisements, solicitation, application, processing, closing or servicing of this Transaction or any instruments executed in conjunction with it (collectively the "Loan Agreements" including but not limited to the terms of the loan, representations, promises, undertakings or covenants made relating to the Loan, or Loan Agreements executed in conjunction with the Note and the Security Instruments, services provided under the Loan Agreements, and the validity and construction of the Loan Agreements); (c) any Transaction, (d) the construction, manufacture, advertisement, sale, installation or servicing of any real or personal property which secures this Transaction, (e) any past, present, or future insurance, service, or product that is offered or sold in connection with this Transaction; (f) any documents or instruments that contain information about or document any Transaction, insurance, service, or product; and (g) any act or omission by Lender regarding any Claim.

Mediation. Except as set forth below, all Claims, shall be **MEDIATED** prior to the filing of any legal proceeding related to any dispute relating to this Transaction. If Borrower and Lender cannot agree on the selection of a mediator for a dispute, the mediator shall be selected as follows: within 5 business days of the notice that either Borrower or Lender have decided to mediate, Borrower and Lender shall each name a mediator and notify that mediator and the other party of the selection. Within 5 business days of their selection the mediators shall jointly select an independent mediator to mediate the dispute. The mediation shall occur not later than 30 days after the mediator is selected at a time and place mutually convenient to all parties within a fifty-mile radius of Borrower's residence.

Borrower and Lender agree to participate in the mediation in good faith with the intention of resolving the dispute, if possible. Legal counsel may, but is not required to represent Borrower or Lender at the mediation. All mediation sessions will be private and all information disclosed during the mediation will be confidential. The mediator may prescribe other rules for the mediation. Expenses of the mediation including the mediator's fee shall be shared equally between Lender and Borrower. Attorneys' fees and related expenses are each party's responsibility.

This Agreement to mediate is specifically enforceable.

If for any reason the mediation is not completed within 45 days after the mediator is selected, or if after the mediation, any Claim is still unresolved, such Claim shall be resolved solely and exclusively by arbitration in accordance with this Agreement.

Arbitration. To the extent allowed by applicable law, any Claim except those set forth below, shall be resolved by binding arbitration in accordance with (1) the Federal Arbitration Act, 9 U.S.C. §§ 1-9; (2) the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association (the "Arbitration Rules") then in effect, and (3) this Agreement. If the terms of this Agreement and the Arbitration Rules are inconsistent, the terms of this Agreement shall control. A copy of the Arbitration Rules, free of charge, may be obtained by calling (800) 778-7879. The laws applicable to the arbitration proceeding shall be the laws of the state in which the property which secures the Transaction is located. The parties agree that the arbitrator shall have all powers provided by law, this Agreement, and the Loan Agreements. However, the arbitrator shall have no power to vary or modify any of the provisions of the Loan Agreements. Any party to this Agreement may bring an action in any court having jurisdiction, including a summary or expedited proceeding, to specifically enforce this Agreement, or

to compel arbitration of any Claim. An action to specifically enforce this Agreement, or a motion to compel arbitration may be brought at any time, even after a Claim has been raised in a court of law or a Transaction has been completed, discharged, or paid in full.

Place of Arbitration. The arbitration shall be conducted in the county of Borrower's residence, or at any other place mutually acceptable to the Lender and the Borrower.

Time of Hearing. The arbitration hearing shall commence within forty-five (45) days of the demand for arbitration.

NO CLASS ACTIONS; NO JOINDER OF PARTIES; WAIVER OF RIGHT TO JURY TRIAL. THE ARBITRATION WILL TAKE THE PLACE OF ANY COURT PROCEEDING INCLUDING A TRIAL BEFORE A JUDGE OR A JUDGE AND JURY. ANY SUCH ARBITRATION SHALL BE CONDUCTED ON AN INDIVIDUAL BASIS, AND NOT AS PART OF A COMMON OR CLASS ACTION. IT IS EXPRESSLY ACKNOWLEDGED AND AGREED BY BORROWER AND LENDER THAT ANY PURPORTED COMMON ISSUES OF LAW OR FACT SHALL BE RESOLVED ON SUCH AN INDIVIDUAL BASIS. IF THE APPOINTED ARBITRATOR SHOULD AWARD ANY DAMAGES, SUCH DAMAGES SHALL BE LIMITED TO ACTUAL AND DIRECT DAMAGES AND SHALL IN NO EVENT INCLUDE CONSEQUENTIAL, PUNITIVE, EXEMPLARY OR TREBLE DAMAGES AS TO WHICH BORROWER AND LENDER EXPRESSLY WAIVE ANY RIGHT TO CLAIM TO THE FULLEST EXTENT PERMITTED BY LAW.

Judgment. The award rendered by the arbitrator shall be final, nonappealable and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

Confidentiality. Borrower and Lender agree that the mediation and arbitration proceedings are confidential. The information disclosed in such proceedings cannot be used for any purpose in any other proceeding.

Claims Excluded from Mediation and Arbitration. Notwithstanding the foregoing, neither Borrower or Lender can require the other to mediate or arbitrate (i) foreclosure proceedings, whether pursuant to judicial action, power of sale, assent to a decree or otherwise, proceedings pursuant to which Lender seeks a deficiency judgment, or any comparable procedures allowed under applicable law pursuant to which a lien holder may acquire title to or possession of any property which is security for this Transaction and any related personal property (including an assignment of rents or appointment of a receiver), upon default by the Borrower on the Transaction or (ii) an application by or on behalf of the Borrower for relief under the federal bankruptcy laws or any other similar laws of general application for the relief of debtors, through the institution of appropriate proceedings; or (iii) any Claim where Lender seeks damages or other relief because of Borrower's default under the terms of a Transaction. Enforcement of this section will not waive the right to arbitrate any other Claim, including a Claim asserted as a counterclaim in a lawsuit brought under this section.

Effect of Rescission. If Borrower has the right to rescind this Transaction, rescinding it will not rescind this Agreement.

No Other Arbitration Agreements. This Agreement is the only agreement between Lender and Borrower regarding alternative dispute resolution, and supersedes any prior agreements to mediate or arbitrate Claims. This Agreement may only be modified by a written agreement between Lender and Borrower.

BORROWER AND LENDER AGREE TO WAIVE ANY RIGHTS TO TRIAL BY JURY OF ANY AND ALL CLAIMS.

II. ONLY WRITTEN LOAN AGREEMENTS

1. The rights and obligations of Borrower and Lender shall be determined solely from the written Loan Agreements, and any prior oral agreements between Lender and Borrower are superseded by and merged into the Loan Agreements.

2. The Loan Agreements may not be varied by any oral agreements or discussions that occur before, contemporaneously with, or subsequent to the execution of the Loan Agreements.

3. Please note:

   THE WRITTEN LOAN AGREEMENTS REPRESENT THE FINAL AGREEMENTS BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES.

   THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES.

III. BROKER AUTHORIZATION

In the event a Broker participated in obtaining this loan, Borrower has authorized the Broker to submit an application for a loan to Lender to be secured by Borrower's real estate and agrees to indemnify and hold Lender harmless from any and all liability for any acts or omissions by the Broker. Borrower confirms that the Broker is solely Borrower's agent and not Lender's agent and Borrower understands that the Broker has not authority to make any agreements, representations or warranties on Lender's behalf or to represent Lender in any respect. Borrower also understands the Lender is not

obligated in any way to make a loan to Borrower and that Lender may accept or reject Borrower's application for a loan in Lender's sole discretion or propose terms other than those contained in Borrower's application.

Borrower represents that I have received and read a copy of this Acknowledgment and Agreement to Mediate or Arbitrate at or before the execution of my Loan Agreements, and that the Closing Agent has read and explained each of the provisions of this Acknowledgment and Agreement to Mediate or Arbitrate to me, which provisions I understand and accept. Borrower also represents that any fees or payments to the Lender which I have made in connection with the Loan were voluntarily made only to Lender and were for necessary and reasonable fees or payments to the Loan may be closed according to standard industry practices.

THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.

Date: 1-23-99

/s/	/s/
PATRICIA G. STARK	STANLEY W. STARK
Borrower	Borrower

I have read and explained each of the above provisions to Borrower.

CLOSING AGENT	DATE

APPENDIX H

Return to: UNITED COMPANIES LENDING®
CORPORATION
4240 BLUE RIDGE BLVD.
KANSAS CITY, MO 64133
_____(Space above this line for recording date)_____

Loan No.: 035601007572
Borrower: STANLEY W. STARK

DEED OF TRUST

NOTICE TO ASSIGNEE

NOTICE: This is a mortgage subject to special rules under the federal Truth in Lending Act. Purchasers or assignees of this mortgage could be liable for all claims and defenses with respect to the mortgage that the borrower could assert against the creditor.

THIS DEED OF TRUST ("Security Instrument") is made on the 23rd day of January, 1999. The grantor is STANLEY W. STARK AND PATRICIA G. STARK, HUSBAND AND WIFE ("Borrower"). The trustee is ALAN E. SOUTH ("Trustee"). The beneficiary is UNITED COMPANIES CORPORATION®, A CORPORATION, which is organized and existing under the laws of the State of LOUISIANA, and whose address is 4041 ESSEN LANE, BATON ROUGE, LOUISIANA 70809 ("Lender"). Borrower owes Lender the principal sum of FIFTY-SIX THOUSAND NINE HUNDRED and NO/100----Dollars (U.S. $56,900.00). This debt is evidenced by Borrower's note dated the same date as this Security Instrument ("Note"), which provides for monthly payments, with the full debt, if

not paid earlier, due and payable on February 1, 2019. This Security Instrument secures to Lender: (a) the repayment of the debt evidenced by the Note, with interest, and all renewals, extensions and modifications of the Note; (b) the payment of all other sums, with interest, advanced under paragraph 7 to protect the security of this Security Instrument; and (c) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in JOHNSON County, Missouri:

SEE LEGAL DESCRIPTION ATTACHED HERETO AND MADE A PART HEREOF

which has the address of 205 N. VINE, HOLDEN, Missouri 64040 ("Property Address");

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal and Interest; Prepayment and late Charges. Borrower shall promptly pay when due the principal of and interest on the debt evidenced by the Note and any prepayments and late charges due under the Note.

2. Funds for Terms and Insurance. Subject to applicable law or to a written waiver by Lender, Borrower shall pay to Lender on the day monthly payments are due under the Note, until the note is paid in full, a sum ("Funds") for: (a) yearly taxes and assessments which may attain priority over this Security Instrument as a lien on the Property; (b) yearly leasehold payments or ground rents on the Property, if any; (c) yearly hazard or property insurance premiums; (d) yearly flood insurance premiums, if any; (e) yearly mortgage insurance premiums, if any; and (f) any sums payable by Borrower to Lender, in accordance with the provisions of paragraph 8, in lieu of the payment of mortgage insurance premiums. These items are called "Escrow Items." Lender may, at any time, collect and hold Funds in an amount not to exceed the maximum amount a lender for a federally related mortgage loan may required for Borrower's escrow account under the federal Real Estate Settlement Procedures Act of 1974 as amended from time to time, 12 U.S.C. § 2061 *et seq.* ("RESPA"), unless another law that applies to the funds sets a lesser amount. If so, Lender may, at any time, collect and hold Funds in an amount not to exceed the lesser amount. Lender may estimate the amount of Funds due on the basis of current da and reasonable estimates of expenditures of future Escro Items or otherwise in accordance with applicable law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is such an institution) or in any Federal Home Loan Bank. Lender shall apply the Funds to

pay the Escrow Items. Lender may not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and applicable law permits Lender to make such a charge. However, Lender may require Borrower to pay a one-time charge for an independent real estate tax reporting service used by Lender in connection with this loan, unless applicable law provides otherwise. Unless an agreement is made or applicable law requires interest to be paid, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender may agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds, showing credits and debits to the funds and the purpose for which each debit to the Funds was made. The Funds are pledged as additional security for all sums secured by this Security Instrument.

If the Funds held by Lender exceed the amounts permitted to be held by applicable law, Lender shall account to Borrower for the excess Funds in accordance with the requirements of applicable law. If the amounts of the Funds held by Lender at any time is not sufficient to pay the Escrow Items when due, Lender may so notify Borrower in writing, and, in such case Borrower shall pay to Lender the amount necessary to make up the deficiency. Borrower shall make up the deficiency in no more than twelve monthly payments, at Lender's sole discretion.

Upon payment in full of all sums secured by that Security Interest, Lender shall promptly refund to Borrower any Funds held by Lender. If, under paragraph 21, Lender shall acquire or sell the Property, Lender, prior to the acquisitions or sale of the Property, shall apply any Funds held by Lender at the time of acquisition or sale as a credit against the sums secured by this Security Instrument.

3. Application of Payments. Unless applicable law provides otherwise, all payments received by Lender under paragraphs 1 and 2 shall be applied: First, to any prepayment charges due under the Note; second, to amounts payable under paragraph 2; third, to interest due; fourth, to principal due; and last, to any late charges due under the Note.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines and imposition attributable to the Property which may attain priority over this Security Instrument, and leasehold payments or ground rents, if any. Borrower shall pay these obligations in the manner provided in paragraph 2, or if not paid in that manner, Borrower shall pay them on time directly to the person owed payment. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this paragraph. If Borrower makes these payments directly, Borrower shall promptly furnish to Lender receipts evidencing the payments.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender; (b) contests in good faith the lien by, or defends against enforcement of the lien in, legal proceedings which in the Lender's opinion operate to prevent the enforcement of the lien; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which may attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Borrower shall satisfy the lien or take one or more of the actions set forth above within 10 days of the giving of notice.

5. Hazard or Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included in the term "extended coverage" and any other hazards, for which

Lender requires insurance, including, but not limited to, floods or flooding, earthquakes or hurricanes (whether or not such hazards are required to be insured against at the time the Loan is made). All insurance required by Lender shall be maintained in the amounts and for the periods that Lender requires. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's approval, which shall not be unreasonably withheld. In the event the Property Improvements are now, or at any time during the term of this Security Instrument are determined to be, in a Special Flood Hazard Area, Borrower must obtain and maintain flood insurance.

Borrower acknowledges and agrees that failure to insure the Property, which is the security for this agreement, according to the terms and conditions of this paragraph 5 is an event of default subject to the remedies available to Lender under this Agreement. If Borrower fails to obtain or maintain any coverage described herein, Lender may, but shall have no duty to, obtain such coverage or substantially equivalent coverage with an insurance carrier of Lender's choice, protecting only Lender's interest in the Property in accordance with paragraph 7, all at Borrower's expense. Lender shall have no duty or obligation to obtain any insurance protecting Borrower's interest in the Property, or covering risks for which Lender has not required insurance coverage, including, without limitation, a homeowners policy. Lender may, in its sole discretion, obtain insurance in whatever amounts and types Lender deems adequate to protect Lender's interest in the Property, regardless of the unpaid balance remaining under the Note or the amounts remaining due under this Security Instrument. For this purpose, Lender will deem its interests to be adequately protected by an insurance policy with coverage equal to the value of the improvements located on the Property securing Borrower's loan. Lender may determine the value of the improvements by assuming as accurate the value assigned to the improvements in the insurance policy

that Lender's records reflect was most recently held by Borrower prior to the insurance policy obtained by Lender. Borrower acknowledges and agrees the amount may not be equal to the actual value or replacement value of the improvements, and any such insurance Lender obtains may not protect Borrower's interest in the Property.

Borrower acknowledges and agrees that the cost of the insurance coverage so obtained by Lender may significantly exceed the cost of insurance Borrower could have obtained, as described in the first paragraph of this paragraph 5, if protecting Borrower's interest in the Property. Borrower further acknowledges and agrees that Lender may obtain any such insurance directly or through an insurance agency or insurer affiliated with Lender and Lender or Lender's affiliate may receive a commission or other compensation in connection with obtaining such insurance.

All insurance policies and renewals shall be acceptable to Lender and shall include a standard mortgage clause. Lender shall have the right to hold the policies and renewals. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. In the event that Borrower cancels a policy on the Property and Borrower replaces it with a different policy, Lender may charge Borrower a reasonable fee (subject to applicable law, if any), to change its response to reflect the new policy. In the event of loss, Borrower shall give prompt notice to the insurance carrier or lender. Lender may make proof of loss if not made promptly by Borrower. In the event Lender acquires the Property through foreclosure or otherwise, Borrower assigns to Lender its right to any refund of unearned premiums and any other rights of Borrower under the insurance policy.

To the extent Borrower obtains any form of insurance coverage for the Property without being directed to do so by Lender, such as flood, earthquake or hurricane coverage,

such policy shall include a standard mortgage clause and shall name Lender as mortgagee. Any insurance proceeds from such policy shall be additional security for the Note and Lender shall have the same rights to such policy and proceeds as it has with regard to Lender required insurance policies discussed in this paragraph 5.

Unless Lender and Borrower otherwise agree in writing, insurance proceeds shall be applied to restoration or repair of the Property damaged, if, at Lender's sole discretion, the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction. Lender shall have the right to deduct fees for such inspections from the insurance proceeds unless prohibited by applicable law or regulation. Fees for public adjusters or other third parties retained by Borrower shall not be deducted from the proceeds and shall be the sole and separate obligation of Borrower. If, in Lender's sole determination, the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with any excess paid to Borrower. Borrower shall remain responsible for any such remaining due and payable under the Note and this Security Instrument. If Borrower abandons the Property, or does not answer within 30 days a notice from Lender that the insurance carrier has offered to settle a claim, then the proceeds will be automatically assigned to Lender. Lender may use the proceeds to repair or restore the Property or to pay sums secured by this Security Instrument, whether or not then due. The 30-day period will begin when the notice is given.

Unless Lender and Borrower otherwise agree in writing, any application of proceeds to principal shall not extend or

postpone the due date of the monthly payments referred to in paragraphs 1 and 2 or change the amount of the payments of principal and interest due under the Note. If under paragraph 21 the Property is acquired by Lender, Borrower's right to any insurance policies and proceeds resulting from damage to the Property prior to the acquisition shall pass to Lender to the extent of the sums secured by this Security Instrument immediately prior to the acquisition.

The provisions contained in this paragraph 5 are subject to limitations under applicable law, if any.

6. Occupancy, Preservation, maintenance and protection of the Property; Borrower's Loan Applications; Leaseholds. Borrower shall occupy, establish, and use the Property as Borrower's principal residence after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control. Borrower shall be in default if any forfeiture action or proceeding, whether civil or criminal, is begun that in Lender's good faith judgment could result in forfeiture of the Property or otherwise materially impair the lien created by this Security Instrument or Lender's security interest. Borrower may cure such a default and reinstate, as provided in paragraph 18, by causing the action or proceeding to be dismissed with a ruling that, in Lender's good faith determination, precludes forfeiture of the Borrower's interest in the Property or other material impairment of the lien created by this Security Instrument or Lender's security interest. Borrower may cure such a default and reinstate, as provided in paragraph 10, by causing the action or proceeding to be dismissed with a ruling that, in Lender's good faith determination, precludes forfeiture of the Borrower's interest in the Property or other material impairment of the lien created by

this Security Instrument or Lender's security interest. Borrower shall also be in default if Borrower, during the loan application process, gave materially false or inaccurate or statements to Lender (or failed to provide Lender with any material information) in connection with the loan evidenced by the Note, including, but not limited to, representations concerning Borrower's occupancy of the Property as a principal residence. If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to that Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

7. Protection of Lender's Rights in the Property. If Borrower fails to perform the covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect the Lender's rights in the Property (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture or to enforce laws or regulations), ten lender may do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the Property. Lender's actions may include paying any sums secured by a lien which has priority over this Security Instrument, appearing in court, paying reasonable attorneys' fees and entering on the Property to make repairs. Although Lender may take action under this paragraph 7, Lender does not have to do so.

8. Mortgage Insurance. If Lender required mortgage insurance as a condition of making the loan secured by this Security Instrument, Borrower shall pay the premiums required to maintain the mortgage insurance in effect, at a cost substantially equivalent to the cost to Borrower of the mortgage insurance previously in effect, from an alternate mortgage insurer approved by Lender. If substantially equivalent mortgage insurance coverage is not available, Borrower shall pay to Lender each month a sum equal to one-twelfth of the

yearly mortgage insurance premium being paid by Borrower when the insurance coverage lapsed or ceased to be in effect. Lender will accept, use and retain these payments as a loss reserve in lieu of mortgage insurance. Loss reserve payments may no longer be required, at the option of Lender, if mortgage insurance coverage (in the amount and for the period that Lender requires) provided by an insurer approved by Lender again becomes available and is obtained. Borrower shall pay the premiums required to maintain mortgage insurance in effect, or to provide a loss reserve, until the requirement for mortgage insurance ends in accordance with any written agreement between Borrower and Lender or applicable law.

9. Inspection. Lender or its agent may make reasonable entries upon and inspections of the Property. Lender shall give Borrower notice as the time of or prior to an inspection specifying reasonable cause for the inspection.

10. Condemnation. The proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation or other taking of any part of the Property, or the conveyance in lieu of condemnation, re hereby assigned and shall be paid to Lender.

In the event of a total taking of the Property, the proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with any excess paid to Borrower. In the event of a partial taking of the Property in which the fair market value of the Proper immediately before the taking is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the taking, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Interest shall be reduced by the amount of the proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the taking, divided by (b) the fair market value of the Property immediately before the taking. Any

balance shall be paid to Borrower. In the event of a partial taking of the Property in which the fair market value of the Property immediately before the taking is less than the amount of the sums secured immediately before the taking, unless Borrower and Lender otherwise agree in writing or unless applicable law otherwise provides, the proceeds shall be applied to the sums secured by the Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, since notice by Lender to Borrower that the condemnor offers to make an award or settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the proceeds, at its option, either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due.

Unless Lender and Borrower otherwise agree in writing, any application of proceeds to principal shall not extend or postpone the due date of the monthly payments referred to in paragraphs 1 and 2 or change the amount of such payments.

11. Borrower Not Released; Forbearance By Lender Not A Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to any successor in interest of borrower shall not operate to release the liability of the original Borrower or Borrower's successors in interest. Lender shall not be required to commence proceedings against any successor in interest or refuse to extend time for payments or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or Borrower's successors in interest. Any forbearance by Lender in exercising any right or remedy shall not be a waiver of or preclude the exercise of any right or remedy.

12. Successors and Assigns Bound; Joint and Several Liability; Co-signers. The covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Lender and Borrower, subject to the provisions of paragraph 17. Borrower's covenants and agreements shall not be joint and several. Any Borrower who co-signs this Security Instrument but does not execute the Note: (a) is co-signing this Security Instrument only to mortgage, grant and convey that Borrower's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower may agree to extend, modify, forbear or make any recommendations with regard to the terms of this Security Instrument or the Note without that Borrower's consent.

13. Loan Charges. If the loan secured by this Security Instrument is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owned under the Note or by making direct payment to Borrower. if a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge under the Note.

14. Notices. Any notice to Borrower provided for in this Security Instrument shall be given by delivering it or by mailing it by first class mail unless applicable law requires use of another method. The notice shall be directed to the Property Address or any other address Borrower designates by notice to Lender. Any notice to Lender shall be given by first class mail to Lender's address stated herein or any other

address Lender designates by Borrower. Any notice provided for in this Security Instrument shall be deemed to have been given to Borrower or Lender when given as provided in this paragraph.

15. Governing Law; Severability. This Security Instrument has been governed by federal law and the law of the jurisdiction in which the Property is located. In the event that any provision or clause of this Security Instrument or the Note conflicts with applicable law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision. To this end the provision of this Security Instrument and the Note are declared to be severable.

16. Borrower's Copy. Borrower shall be given one conformed copy of the Note and of this Security Instrument.

17. Transfer of the Property or a Beneficiary Interest in Borrower. If all or any interest in it is sold or transferred (or if a beneficial interest in Borrower is sold or transferred and Borrower is not a natural person) without Lender's prior written consent, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if exercise is prohibited by federal law as of the date of this Security Interest.

18. Borrower's Right to Reinstate. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instruments discontinued at any time prior to the earlier of: (a) 5 days (or such other period as applicable law may specify for reinstatement) before sale of the Property pursuant to any power of sale contained in this Security Instrument; or (b) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other cove-

nants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees of up to 15.00% of the sums due under the Note described above or the amount allowable under applicable state law, and (d) takes such action as Lender may reasonably require to assure that the lien of this Security Instrument, Lender's right in the Property and Borrower's obligation to pay the sums secured by this Security Investment shall continue unchanged. Upon reinstatement by Borrower, this Security Instrument and the obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under paragraph 17.

19. Sale of Note; Change of Loan Servicer. The Note or a partial interest in the Note (together with this Security Instrument) may be sold one or more times without prior notice to Borrower. A sale may result in a change in the entity (known as the "Loan Servicer") that collects monthly payments due under the Note and this Security Instrument. There also may be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change in accordance with paragraph 14 above and applicable law. The notice will also contain any other information required by applicable law.

20. Hazardous Substances. borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances on or in the Property. Borrower shall not do, not allow anyone else to do, anything affecting the Property that is in violation of any Enforcement Law. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property.

Borrower shall promptly give Lender written notice of any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge. If Borrower learns, or is notified by any governmental or regulatory authority, that any removal or other remediation of Hazardous Substances affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law.

As used in this paragraph 20, "Hazardous Substances" are those substances defined as toxic or hazardous substances by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials. As used in this paragraph 20, "Environmental Law means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protections.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

21. Acceleration; Remedies. Following Borrower's breach of any covenant or agreement in this Security Instrument, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by applicable law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this paragraph 21, including, but not limited to, reasonable attorneys' fees of up to 15.00% of the sums due under the Note described above or the amount allowable under applicable state law and costs of title evidence.

If Lender invokes the power of sale, Lender or Trustee shall mail copies of a notice of sale in the manner prescribed

by applicable law to Borrower and to the other persons prescribed by applicable law. Trustee shall give notice of sale by public advertisement for the time and in the manner prescribed by applicable law. Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder for cash at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property to any later time on the same date by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's fees and attorneys' fees of up to 15.00% of the sums due under the Note described above or the amount allowable under applicable state law; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

22. Release. Upon payment of all sums secured by this Security Instrument, Lender shall release the Security Instrument to Borrower. To the extent permitted by applicable law, Borrower is responsible for all costs associated with canceling this Security Instrument including, but not limited to, any fee paid to a third party for the preparation and recordation of any legal document as well as any fee paid to a public official.

23. Substitute Trustee. Lender, at its option, may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder by an instrument recorded in the county in which this Security Instrument is re-

corded. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by applicable law.

24. Lease of the Property. Trustee hereby leases the Property to Borrower until this Security Instrument is either satisfied and released or until there is a default under the provisions of this security Instrument. The Property is leased upon the following terms and conditions: Borrower, and every person claiming an interest in or possessing the Property or any part thereof, shall pay rent during the term of the lease in the amount of one cent per month, payable on demand, and without notice or demand shall and will surrender peaceable possession of the Property to Trustee upon default or to the purchaser of the Property at the foreclosure sale.

25. Agreement to Mediate or Arbitrate. READ THIS AGREEMENT CAREFULLY. IT LIMITS CERTAIN OF YOUR RIGHTS, INCLUDING YOUR RIGHT TO GO TO COURT. In this agreement to mediate or arbitrate (this "Agreement"), (1) "Transaction" means any (a) payment of money, (b) transfer or exchange of property or any other thing of value, (c) any one or more past, present, or future extensions of, advertisement, solicitation, applications for, or inquiries about, credits, or forbearance of payment, such as a loan, a credit sale, or otherwise, from Lender to Borrower, including this Transaction, (d) gift, or (e) promise to enter into a Transaction, and (2) "Claim" mean any case, controversy, dispute, tort, disagreement, lawsuit, claim, or counterclaim, and other matters in question now or hereafter exhibiting between Lender and Borrower. A Claim includes, without limitation, anything arising out of, in connection with, existing between Lender and Borrower. A Claim includes, without limitation, anything arising out of, in connection with, or relating to: (a) this Agreement; (b) to the advertisement, solicitation, application, processing, closing or servicing of this Transaction or any instruments executed in con-

junction with it (collectively the "Loan Agreement" including but not limited to the terms of the loan, representations, promises, undertakings or covenants made relating to the Loan, or Loan Agreements executed in conjunction with the Note and this Security Instrument, services provided under the Loan Agreements, and the validity and construction of the Loan Agreements); (c) any Transactions; (d) the construction, manufacture, advertisement, sale, installation or servicing of any real or personal property which secures this Transaction; (e) any past, present, or future insurance, service, or product that is offered or sold in connection with a Transaction; (f) any documents or instruments that contain information about or document any Transaction, insurance, service, or product; and (g) any act or omission by Lender regarding any Claim.

Mediation. Except as set forth below, all Claims, shall be MEDIATED prior to the filing of any legal proceeding related to any dispute relating to this Transaction. If Borrower and Lender cannot agree on the selection of a mediator for a dispute, the mediator shall be selected as follows: within 5 business days of the notice that either Borrower or Lender have decided to mediate, Borrower and Lender shall each name a mediator and notify the mediator and the other party of the selection. Within 5 business days of their selection the mediators shall jointly select an independent mediator to mediate the dispute. The mediation shall occur not later than 30 days after the mediator is selected at a time and place mutually convenient to all parties within a fifty-mile radius of Borrower's residence.

Borrower and Lender agree to participate in the mediation in good faith with the intention of resolving the dispute, if possible. Legal counsel may, but is not required to represent Borrower or Lender at the mediation. All mediation sessions will be private and all information disclosed during the mediation will be confidential. The mediator may prescribe

other rules for the mediation. Expenses of the mediation including the mediator's fee shall be shared equally between Lender and Borrower. Attorneys' fees and related expenses are each party's responsibility.

This Agreement to mediate is specifically enforceable.

If for any reason the mediation is not completed within 45 days after the mediator is selected, or if after the mediation any Claim is still unresolved, such Claim shall be resolved solely and exclusively by arbitration in accordance with this Agreement.

Arbitration. To the extent allowed by applicable law, any Claim, except those set forth below, shall be resolved by binding arbitration in accordance with (1) the Federal Arbitration Act, 9 U.S.C. §§ 1-9; (2) the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association (the "Arbitration Rules") then in effect; and (3) this Agreement. If the terms of this Agreement and the Arbitration Rules are inconsistent, the terms of this Agreement shall control. A copy of the Arbitration Rules, free of charge, may be obtained by calling (800) 778-7879. The laws applicable to the arbitration proceeding shall be the laws of the state in which the property which secures the Transaction is located. The parties agree that the arbitrator shall have all powers provided by law, this Agreement, and the Loan Agreements. However, the arbitrator shall have no power to vary or modify any of the provisions of the Loan Agreements. Any party to this Agreement may bring an action in any court having jurisdiction, including a summary or expedited proceeding, to specifically enforce this Agreement, or to compel arbitration of any Claim. An action to specifically enforce this Agreement, or a motion to compel arbitration may be brought at any time, even after a Claim has been raised in a court of law or a Transaction has been completed, discharged, or paid in full.

Place of Arbitration. The arbitration shall be conducted in the county of borrower's residence, or at any other place mutually acceptable to the Lender and the Borrower.

Timing of Hearing. The arbitration hearing shall commence within forty-five (45) days of the demand for arbitration.

NO CLASS ACTIONS; NO JOINDER OF PARTIES; WAIVER OF RIGHT TO JURY TRIAL. THE ARBITRATION WILL TAKE THE PLACE OF ANY COURT PROCEEDING INCLUDING A TRIAL BEFORE A JUDGE OR A JUDGE AND JURY. ANY SUCH ARBITRATION SHALL BE CONDUCTED ON AN INDIVIDUAL BASIS, AND NOT AS PART OF A COMMON OR CLASS ACTION. IT IS EXPRESSLY ACKNOWLEDGED AND AGREED BY BORROWER AND LENDER THAT ANY PURPORTED COMMON ISSUES OF LAW OR FACT SHALL BE RESOLVED ON SUCH AN INDIVIDUAL BASIS. IF THE APPOINTED ARBITRATOR SHOULD AWARD ANY DAMAGES, SUCH DAMAGES SHALL BE LIMITED TO ACTUAL AND DIRECT DAMAGES AND SHALL IN NO EVENT INCLUDE CONSEQUENTIAL, PUNITIVE, EXEMPLARY OR TREBLE DAMAGES AS TO WHICH BORROWER AND LENDER EXPRESSLY WAIVE ANY RIGHT TO CLAIM TO THE FULLEST EXTENT PERMITTED BY LAW.

Judgment. The award rendered by the arbitrator shall be final, nonappealable and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

Confidentiality. Borrower and Lender agree that the mediation and arbitration proceedings are confidential. The information disclosed in such proceedings cannot be used for any purpose in any other proceeding.

Claims Excluded from Mediation and Arbitration. Notwithstanding the foregoing, neither Borrower or Lender can require the other to mediate or arbitrate (i) foreclosure proceedings, whether pursuant to judicial action, power of sale, assent to a decree or otherwise, proceedings pursuant to which Lender seeks a deficiency judgment, or any comparable procedure allowed under applicable law pursuant to which a lien holder may acquire title to or possession of any property which is security for this Transaction and any related personal property (including an assignment of rents or appointment of a receiver), upon default by the Borrower on the Transaction or (ii) an application by or on behalf of the Borrower for relief under the federal bankruptcy laws or any other similar laws of general application for the relief of debtors, through the institution of appropriate proceedings; or (iii) any Claim where Lender seeks damages or other relief because of Borrower's default under the terms of a Transaction. Enforcement of this section will not waive the right to arbitrate any other Claim, including a Claim asserted as a counterclaim in a lawsuit brought under this section.

Effect of Rescission. If Borrower has the right to rescind this Transaction, rescinding it will not rescind this Agreement.

No Other Arbitration Agreements. This Agreement is the only agreement between Lender and Borrower regarding alternative dispute resolution, and supersedes any prior agreements to mediate or arbitrate Claims. This Agreement may only be modified by a written agreement between Lender and Borrower.

BORROWER AND LENDER AGREE TO WAIVE ANY RIGHTS TO TRIAL BY JURY OF ANY AND ALL CLAIMS.

26. Riders to this Security Instrument. If one or more riders are executed by Borrower and recorded together with this Security Instrument, the covenants and agreements of

each such rider shall be incorporated into and shall amend and supplement the covenants and agreements of this Security Instrument as if the rider(s) were a part of this Security Instrument. [Check applicable box(es)]

- ☐ Adjustable Rate Rider
- ☐ Condominium Rider
- ☐ 1-4 Family Rider
- ☐ Graduated Payment Rider
- ☐ Planned Unit Development Rider
- ☐ Biweekly Payment Rider
- ☐ Balloon Rider
- ☐ Rate Improvement Rider
- ☐ Second Home Rider
- ☐ Other(s) (specify)

THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISIONS WHICH MAY BE ENFORCED BY THE PARTIES.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any rider(s) executed by Borrower and recorded with it.

_____/s/_____ (Seal)
PATRICIA G. STARK - BORROWER

_____/s/_____ (Seal)
STANLEY W. STARK - BORROWER

Oral agreements or commitments to loan money, extend credit or to forbear from enforcing repayment of a debt including promises to extend or renew such debt are not enforceable. To protect you (borrowe(s)) and us (creditor) from misunderstanding or disappointment, any agreements we reach covering such matters are contained in this writing, which is the complete and exclusive statement of the agreement between us, except as we may later agree in writing to modify it.

Supreme Court, U.S.
FILED
MAR 3 - 2005
OFFICE OF THE CLERK

No. 04-1056

IN THE

Supreme Court of the United States

EMC MORTGAGE CORPORATION,

Petitioner,

v.

STANLEY WILLIAM STARK and PATRICIA GARNET STARK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED

The Starks more accurately state the questions presented:

1. **Intracircuit conflict.** The circuit courts resolve intracircuit conflicts by sitting *en banc*. The Eighth Circuit found no conflict between this case and *Gannon v. Circuit City Stores, Inc.*, an arbitrability case. It voted not to rehear this case *en banc*.

   Should the Court resolve EMC's supposed intracircuit conflict?

2. **Expanded judicial review.** The Constitution applies only to state action. EMC and the Starks signed a private arbitration contract.

   Should the Court expand the Constitution to cover private contracts, so lower courts must review arbitration awards under the Due Process Clause?

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STATEMENT OF THE CASE

Judge Mason justly punished a wealthy debt collector that flouts the law. EMC invaded the Starks' home and continued to contact them directly—even after Judge Mason issued his award. As Judge Mason realized, a sizeable punitive-damages award is the only way to stop this debt collector's continuing reprehensible conduct.

The Starks are an elderly couple who live in a small Missouri town. When they could no longer pay their mortgage, they sought counsel and filed bankruptcy.[1] After the bankruptcy court lifted the automatic stay, on advice of counsel, they moved across the street to a rented duplex to avoid being evicted.[2] They were concerned about their reputation in the community and they wanted to abide by the law.[3]

EMC is a debt collector.[4] It purchased the Starks' defaulted loan so it could foreclose and take their home.[5] EMC's agents contacted the Starks at least 10 times after it knew they were represented by counsel. EMC contacted the Starks by letter, phone calls at work, and in person.[6]

When EMC began taking steps to foreclose, the Starks filed this lawsuit.[7] The Starks sued for EMC's violations of the Fair

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[1] Appellee Appendix, at 100.

[2] Appellee Appendix, at 148.

[3] Appellee Appendix, at 134.

[4] Appendix, at 24.

[5] Appendix, at 80.

[6] Appendix, at 1-38, Appellee Appendix, at 109, 362-63.

[7] Appendix, at 1.

Debt Collection Practices Act (FDCPA) and to enforce their rescission under the Truth in Lending Act.[8] The Starks also sued for emotional distress.[9]

Judge Smith, of the district court, denied the Starks' motion for a temporary restraining order preventing the pending foreclosure.[10] The main reason for the denial was that the Starks had already moved out.[11] Therefore, the TRO was not necessary to protect the *status quo*.[12] But EMC never foreclosed.[13]

EMC compelled the Starks into binding arbitration.[14] Judge Smith rejected the Starks' argument that the arbitration agreement was an unconscionable adhesion contract that abrogated their statutory rights.[15] Once in arbitration, EMC's agent broke into the Starks' home.[16] The agent posted a humiliating sign in the window stating EMC had taken possession.[17] With Judge Mason's consent, the Starks raised intentional-tort claims for EMC's forcible entry into their

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[8] Appendix, at 1.

[9] *See* Appendix, at 45, Amended Complaint, ¶ 52.

[10] Appendix, at 218.

[11] *Id.*

[12] *Id.*

[13] Appellee Appendix, at 28.

[14] Appendix, at 88.

[15] Appendix, at 161.

[16] Appendix, at 230, 386, 394, 548; Appellee Appendix, at 51, 53-54, 118-120.

[17] Appellee Appendix, at 118-120.

home.[18] The Starks sought actual damages and $14.8 million in punitive damages on their intentional-tort claims.[19]

The parties briefed and orally argued whether punitive damages and attorney fees were available under the arbitration agreement.[20] The Starks argued that the arbitration agreement was unconscionable.[21] But Judge Mason held the agreement was ambiguous because it promises powers to the arbitrator and then takes them away.[22] He held that the Starks could recover attorney fees on their FDCPA claims despite the arbitration agreement's prohibition of fee shifting.[23] He also held that he had the power to award punitive damages on the Starks intentional-tort claims against EMC.[24] He overruled EMC's motion to dismiss the Starks' punitive-damages claims.[25]

Months later, after taking evidence from EMC and considering more briefs, Judge Mason entered his final award.[26] He held that EMC repeatedly violated the FDCPA.[27] He also

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[18] Appendix, at 176, 564.

[19] Appellee Appendix, at 33.

[20] Appendix, at 175-76, 218.

[21] Appendix, at 362.

[22] Pet. App. 39a.

[23] Pet. App. 29a.

[24] Pet. App. 22a.

[25] Pet. App. 33a.

[26] Pet. App. 24a.

[27] Pet. App. 27a

found that even though the Starks had moved across the street on their counsel's advice, they had not abandoned their home.[28] He stated that EMC's forcible entry was "reprehensible and outrageous and in total disregard of [the Starks'] legal rights."[29]

Judge Mason awarded the Starks statutory damages, actual damages, punitive damages, and attorney fees.[30] For the punitive-damages award, Judge Mason noted the financial records provided by EMC showed shareholders equity of nearly $6 billion.[31] Judge Mason awarded the Starks punitive damages equal to one percent of shareholders equity.[32] He stated "[t]his is not great punishment but it should act as a deterence [sic]."[33] Judge Mason stated the amount of punitive damages was $6 million.[34]

The Starks later requested Judge Smith to remand the case to Judge Mason to clarify whether he intended to award one percent of shareholders equity, approximately $60 million, or the $6 million that he stated in the award.[35] Judge Smith agreed that, if he had not vacated the award, the issue would require further input from Judge Mason.[36] However, after Judge Smith

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[28] Pet. App. 28a.

[29] Pet. App. 28a

[30] Pet. App. 29a.

[31] Pet. App. 29a.

[32] Pet. App. 29a.

[33] Pet. App. 29a.

[34] Pet. App. 29a.

[35] Appendix, at 207.

[36] *See* Pet. App. 17a n.2.

vacated the award, Judge Mason sent Judge Smith a letter confirming that he intended to award $6 million.[37]

The Starks also refer the Court to the facts in Section I of the Eighth Circuit's decision.[38] None of the distinguished Eighth Circuit panel members (Heaney, Bye, Smith, JJ.) dissented. Judge Mason found EMC's breaking into the Starks' home during arbitration outrageous and reprehensible.[39] Judge Smith stated the punitive-damages award was "completely justified."[40] If Judge Smith had not erroneously construed the arbitration agreement's limited punitive-damages waiver, even he would have let the punitive-damages award stand.[41] But Judge Mason's award was not enough—on January 10, 2003, EMC violated the FDCPA by contacting the Starks again.

Figure 1 provides a timeline of the break-in and the direct contacts even after Judge Mason's award.[42]

On December 3, 2004, EMC finally paid the punitive-damages award.

The Starks list where EMC misstated facts and point out the petition's pertinent typographical errors:

1. Several times EMC states this case involves punitive damages awarded under the FDCPA.[43] This obfuscates

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[37] Pet. App. 32a.

[38] Pet. App. 2a-4a.

[39] Pet. App. 28a.

[40] Pet. App. 19a n. 3.

[41] Pet. App. 19a-20a n. 3.

[42] Resp. App. 13a.

[43] 15 U.S.C. § 1692-1692o; Pet. 2; Pet. 19.

the issue. EMC broke into the Starks' home after it forced the FDCPA case to arbitration. The Starks moved to add claims under Missouri's common law for intentional infliction of emotion distress and for invasion of privacy.[44] In district court later, EMC stated "[The Starks] were also permitted by the arbitrator to assert brand new common law claims of intentional infliction of emotional distress and invasion of privacy, over EMC's objection."[45] Missouri common-law-tort claims supported punitive damages, not FDCPA claims.

Demonstrating a fundamental misunderstanding of this case's issues, EMC argues punitive damages are not available under the FDCPA.[46] Judge Mason awarded punitive damages in this case for the Starks' common-law-intentional-tort claims. As the Eighth Circuit correctly observed, "the Starks moved to amend their complaint to include claims alleging intentional torts against EMC and seeking punitive damages."[47]

2. EMC states the Starks agreed their lender could "do . . . whatever is necessary to protect the value of the Property and Lender's rights in the Property," including "entering on the Property."[48] EMC misstates the agreement. The security agreement actually says, "Lender's actions may include . . . entering on the Property to make repairs."[49]

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[44] Appellee's Appendix 253.

[45] *Id.*

[46] Pet. 19.

[47] Pet. App. 3a.

[48] Pet. 3.

[49] Pet. App. 53a.

EMC misstates the facts saying, it "carried out its contractual obligation to investors in loans securitized by properties such as the Starks' to secure the premises by retaining a company to ensure that [the Stark]s' vacant home was protected from the elements and from vandalism."[50] Judge Mason ruled regarding EMC's testimony on this point. He stated in the award, "EMC offered the testimony of an employee as to the perils involved with vacant property. This was generalized testimony and none of those perils were attributed to the Stark property. Her testimony was not pertinent and deserves no further consideration."[51] EMC asks this Court to review the evidence and supplant its factual findings for Judge Mason's findings. But the Court has held "[w]e do not grant a certiorari to review evidence and discuss specific facts."[52]

3. EMC also claims it acted "pursuant to the terms of the Deed of Trust" when it broke into the Starks' home.[53] But EMC does not point out that it violated its own deed of trust by not giving the Starks notice prior to entering their home.[54] EMC and the Starks agreed that Judge Mason would construe the loan agreements, which include the deed of trust. The arbitration agreement states all claims must be arbitrated. It defines claim as, "anything . . . relating to . . . construction of the Loan Agreements."[55] Judge Mason

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[50] Pet. 3.

[51] Pet. App. 26a.

[52] *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J.).

[53] Pet. 3.

[54] Pet. App. 54a, para. 9 (*see* correction of typographical error).

[55] Pet. App. 38a.

found that EMC's acknowledged agent forcibly entered the Starks home "without notice or consent . . . ."[56] Judge Mason also considered EMC's suggestion that its agent forcibly entered the home "for protection purposes."[57] He said, "[e]ven in a small town you don't protect a house by posting a sign. In fact this could advertise that the house is vacant and lead to vandalism or other perils."[58]

4. EMC claims it "allegedly violated" the FDCPA by contacting the Starks.[59] Yet, Judge Mason also made a factual finding on this issue. He found that "[t]he letters of 'acceleration' and 'foreclosure' required by law should have been sent to [the Starks' lawyer] True not to the plaintiff's [sic]."[60] He also found that the letters were deceptive.[61] More importantly, EMC did not appeal Judge Smith's confirmation of the FDCPA portions of the arbitration award. In fact, EMC did not even move Judge Smith to vacate the FDCPA portion of the award.[62] Therefore, the FDCPA issues are not before the Court.[63]

5. EMC mentions out of context that the Starks initially requested $165,285 in punitive damages.[64] The

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[56] Pet. App. 26a.

[57] Pet. App. 26a.

[58] Pet. App. 26a.

[59] Pet. 3.

[60] Pet. App. 27a.

[61] Pet. App. 27a.

[62] Pet. App. 4a.

[63] *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981).

[64] Pet. 3.

arbitration transcript shows the Starks derived that figure before EMC provided financial statements showing its nearly $6 billion net worth. Here is what Mr. True said to Judge Mason:

> [W]e've stated a figure on punitive damages for the tort claims of invasion of privacy and infliction of emotional distress. But keep in mind, Judge, we can't really give an accurate statement of what punitive damages would be appropriate here because we have never received financial information that we've requested and that you've ordered them to turn over.[65]

Judge Mason responded, "[a]nd I would give you time to get ready to present [evidence on the appropriate amount of punitive damages]."[66]

6. EMC claims that Judge Mason based his award on Bear Stearns' financial statements. Yet, EMC does not mention that Judge Mason relied on EMC's statement that it has no separate financial records. The transcript reflects the parties' discussion with Judge Mason on the issue:

> JUDGE MASON: According to the letter I have from John [Dods, attorney for EMC], EMC doesn't have separate financial records. They are a part of—I have forgotten the name of the organization.
>
> MR. TRUE: Bear Stearns.
>
> MR. DODS: Bear Stearns; yes, sir.
>
> JUDGE MASON: The broker?

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[65] Appellee's App. Vol. I, at 35.

[66] Appellee's App. Vol. I, at 36.

MR. DODS: Yes.

JUDGE MASON: Or the banker, whatever.

MR. DODS: And we have provided all of the records referenced where you could get Bear Stearns' information. It is all consolidated.[67]

Judge Mason specifically found in his award that EMC stated it does not have financial records separate from Bear Stearns. Judge Mason wrote, "[p]retrial True requested financial data of EMC. He was furnished financial data of the parent corporation, Bear, Stearns, with the explanation that as a subsidiary EMC does not have separate financial records."[68] Judge Mason continued, "[e]ven in this era of publicized corporate malfeasance and misfeasance, I find it difficult to believe that the CEO and Board of Directors of a large publicly traded corporation [Bear, Stearns] would not have financial information on a wholly owned subsidiary. I will accept the information provided."[69] Even though he doubted EMC was telling the truth, he had to accept the information EMC gave him.

If EMC does have separate financial records, then it must have deliberately deceived Judge Mason. Judge Mason based his award on the only financial information EMC did produce—Bear Stearns' financial statements. He relied on EMC's statement that it does not have separate financial records. EMC cannot defy Judge Mason by refusing to provide its financial records, and then argue Judge Mason acted improperly in relying on its deceptive statements.

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[67] Appellee's App. Vol. II, at 234-235.

[68] Pet. App. 28a.

[69] Pet. App. 28a-29a.

7. EMC even misstates Judge Mason's award when it says "the arbitrator awarded Respondents '$1,000.00' in 'actual damages,' [and] '$1,000.00' in 'statutory damages,' . . . ."[70] Judge Mason actually awarded each of the Starks those amounts, for a total of $4,000 in actual and statutory damages.[71]

Pertinent Typographical Errors

Pet. App. Page Reference	Incorrect statement	Correct statement
4a	The arbitrator found EMC's forcible entry into the premises. "reprehensible and outrageous and in total disregard of plaintiff's [sic] legal rights" and awarded $6,000,000 in punitive damages against EMC.	The arbitrator found EMC's forcible entry into the premises "reprehensible and outrageous and in total disregard of plaintiff's [sic] legal rights" and awarded $6,000,000 in punitive damages against EMC.[72]
29a	At one percent of shareholders equity this is not great punishment but it should act as a deference.	At one percent of shareholders equity this is not great punishment but it should act as a *deterence* [sic].[73]

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[70] Pet. 4.

[71] Pet. App. 29a; *see also* Pet. App. 4a (*see* correction of typographical error).

[72] Appeal Addendum, at 14.

[73] *See* Pet. 13a.

54a, para. 9	Lender shall give Borrower notice as the time of or prior to an inspection specifying reasonable cause for the inspection.	Lender shall give Borrower notice *at* the time of or prior to an inspection specifying reasonable cause for the inspection.[74]

REASONS FOR DENYING THE PETITION

Because it lost, EMC wants the Court to take this case, reverse 50 years of precedent, and expand judicial review of arbitrators. Yet, even EMC acknowledges the strong federal policy in favor of arbitration embodied in the Federal Arbitration Act (FAA). The Eighth Circuit adhered to the strong federal policy by following settled legal principles. Justice Stevens has stated, this Court "seldom takes a case merely to reaffirm settled law. . . ."[75]

EMC and the Starks chose retired Missouri judge Donald Mason to construe the arbitration agreement. The Eighth Circuit affirmed Judge Mason on three separate bases. The circuit court held that the arbitration contract's limited waiver permits punitive damages for intentional torts. Since this Court does not take cases that have had three levels of review (arbitrator, district court, circuit court) just to construe a private contract for private parties, the Court should deny certiorari.

EMC's argues the Eighth Circuit has changed Missouri law and contradicts its own case, *Gannon v. Circuit City Stores, Inc.*[76] EMC made its *Gannon* argument in a motion for rehearing *en banc*. The Eighth Circuit denied *en banc* review because it

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[74] Appellee's App. 411 (emphasis added).

[75] *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissent).

[76] *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677 (8th Cir. 2001).

has limited *Gannon* to arbitrability.[77] The circuit court sees no conflict between *Gannon* and this case. And this Court does not resolve intracircuit conflicts—especially those that don't exist.

This Court need not expand the Constitution, when the Eighth Circuit reviewed the arbitration award for due-process violations in its manifest-disregard-of-law analysis. EMC can't cite a single case that supports expanded judicial review of arbitrators. The only arbitration case EMC cites is *Sawtelle v. Waddell & Reed, Inc.*[78] But that case is still on appeal and subject to reversal.[79] Even so, *Sawtelle* followed the same reasoning as the Eighth Circuit—folding due-process review into the manifest-disregard-of-law analysis. *Sawtelle* simply reached a different conclusion than the Eighth Circuit. EMC's dissatisfaction with the result actually drives its latest appeal, not disagreement with the Eighth Circuit's method.

The Eighth Circuit's decision is correct and does not conflict with any decision of this Court or another circuit court. The decision applied settled legal principles to the case's facts. The confirmation of an arbitration award on common-law-intentional-tort claims does not raise any important federal-law issue. So the Court should deny the petition.

The Starks will first show that the Eighth Circuit's alternate bases for its decision are adequate. Then the Starks will show that the case is fact specific and there is no intracircuit conflict. Next, the Starks will demonstrate that EMC's results-based review abrogates the strong federal policy in favor of

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[77] Pet. 21a.

[78] *Sawtelle v. Waddell & Reed, Inc.*, 754 N.Y.S.2d 264 (A.D. 1 Dept. 2003).

[79] Susanne Craig, *New Rule May Lead More Arbitrations Into the Courtroom*, WALL STREET JOURNAL (EASTERN EDITION), Feb 4, 2005 at C1; Telephone interview with Rose, secretary for Jeffrey L. Liddle, Mr. Sawtelle's lawyer (February 24, 2005).

arbitration and that the decision was correct. Finally, the Starks will give two procedural reasons to deny certiorari.

1. The Court should deny certiorari because two adequate alternate bases support the Eighth Circuit's decision.

Even if the Court disagrees with the Eighth Circuit's holding that the punitive-damages waiver is limited by its own terms—to the extent permitted by law—the Eighth Circuit's two alternate bases adequately support its decision. Therefore, the Court need not grant certiorari.

A. Judge Mason resolved the arbitration agreement's ambiguity.

First, the Eighth Circuit held that Judge Mason's finding the arbitration agreement ambiguous on the availability of punitive damages was rational.[80] At one point, the arbitration agreement states the arbitrator must resolve claims under the FAA, which permits punitive-damages waivers. Yet, the choice-of-law provision states the arbitrator must resolve claims under "applicable [Missouri] law."[81] Missouri law does not permit punitive-damages waivers for future intentional torts.[82] Therefore, the Eighth Circuit held Judge Mason's finding ambiguity, although incorrect, was rational.

This Court holds that the arbitrator, not the court, must construe the arbitration agreement.[83] To resolve the ambiguity, Judge Mason construed the arbitration agreement against its drafter and ruled the Starks may claim punitive damages.[84] In

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[80] Pet. 10a-11a.

[81] Arbitration Agreement, Pet. App. 39a.

[82] Pet. App. 8a.

[83] *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401, 406-407 (2003).

[84] Arbitrator's Declaration of Law and Limited Findings of Fact, Pet. App. 22a-23a.

its petition, EMC does not argue Judge Mason was irrational. Therefore, because the Eighth Circuit's alternate basis for its holding is adequate, the Court need not grant certiorari.

B. The Eighth Circuit held Judge Mason did not manifestly disregard *State Farm* or *BMW*.

The Eighth Circuit held that Judge Mason did not manifestly disregard the law by awarding punitive damages. More specifically, he did not disregard *State Farm* or *BMW*.[85] First, Judge Mason could not have disregarded *State Farm*, which this Court did not decide until after the award.[86] Further, to meet the manifest-disregard-of-law standard, the arbitrator must clearly identify the law, then disregard it.[87] As the Eighth Circuit pointed out, the record does not show Judge Mason identified *BMW*, then disregarded it.[88]

The Eighth Circuit further held that Judge Mason correctly followed governing Missouri law on punitive damages. He based his calculation on EMC's net worth, as provided by Missouri law. EMC called Judge Mason a rogue,[89] but, in fact, he is a distinguished retired Missouri judge.[90] He is obviously capable of applying Missouri law.

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[85] *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

[86] Pet. 13a n. 3.

[87] *Hoffman v. Cargill Inc.*, 236 F.3d 458, 461-62 (8th Cir. 2001).

[88] Pet 13a.

[89] EMC's Petition For Rehearing *En banc*, filed Sept. 23, 2004.

[90] Judge Mason served on the 16th Circuit Court of Missouri for over 18 years. He is a former President of the Kansas City Bar Association, received the President's Award from the Missouri Bar and an Achievement Award from the Kansas City Missouri Bar Association. He graduated from Missouri Western University and the University of Missouri - Kansas City School of Law. Judge Mason was a practicing attorney for 24 years before he ascended to the bench.

In its petition, EMC does not argue the alternate bases are wrong. Either basis provides sufficient foundation for the Eighth Circuit's ruling. Therefore, the Court should deny certiorari.

2. The Court should deny certiorari because it does not resolve intracircuit conflicts and, even if it did, *Gannon* does not conflict with this case.

A. The Court does not resolve conflicts between circuit court panels.

Even though the Supreme Court does not resolve intracircuit conflicts, EMC primarily argues this Court must resolve a supposed conflict between the Eighth Circuit's *Gannon v. Circuit City Stores, Inc.*[91] and this case. This Court holds that a conflict between decisions rendered by different panels of the same Court of Appeals is not a sufficient basis for granting a writ of certiorari.[92] Instead, the Court of Appeals settles intracircuit conflicts by sitting *en banc*. This Court has concluded, "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties."[93]

B. The Eighth Circuit finds no conflict with *Gannon*.

Knowing circuit courts resolve conflicts with *en banc* rehearings, EMC moved the Eighth Circuit for a rehearing.[94] EMC claimed the same conflict with *Gannon*. But the Eighth Circuit denied EMC's motion for a rehearing *en banc* by a wide majority. Eight judges voted against EMC.[95]

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[91] *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677 (8th Cir. 2001).

[92] *Davis v. United States*, 417 U.S. 333, 340 (1974).

[93] *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

[94] Pet. App. 21a.

[95] The eight active circuit judges that voted not to rehear the case *en banc* are James B. Loken, Chief Judge, Morris S. Arnold, Diana E. Murphy, Kermit E. Bye, William Jay Riley, Michael J. Melloy, Lavenski R. Smith, and Duane Benton.

The Eighth Circuit knows this case cannot contradict *Gannon* because *Gannon* was an arbitrability case. Judge Bowman, who wrote *Gannon*, said the only issue "was whether the district court erred by not severing the invalid provision . . . and ordering the parties to proceed to arbitration on the remaining valid provisions."[96] The Eight Circuit has cited *Gannon* three other times—all in arbitrability cases.[97]

C. EMC relies on *Gannon dictum* that does not even conflict with this case.

In *Gannon*, included in the appendix,[98] the parties argued about whether they must arbitrate their dispute. Circuit City's arbitration agreement limited punitive damages to $5,000. Both parties agreed Missouri law invalidated the provision. Gannon argued that the entire arbitration agreement was unenforceable because of the invalid provision. But the Eighth Circuit held that the arbitration agreement was enforceable because the court can sever the invalid provision.

EMC desperately grasps *Gannon dictum* stating "Missouri courts have not suggested that it is improper to include [punitive-damages-limitation] terms in their contracts."[99] But Circuit City did not appeal the district court's decision invalidating its punitive-damages-limitation provision. In fact, Circuit City agreed with the district court. Therefore, *Gannon* did not decide the provision's validity under Missouri law. *Gannon* only made this statement in relation to its analysis of

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[96] *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp, U.S.A.*, 334 F.3d 721, 727 (8th Cir. 2003) *cert. denied*, 540 U.S. 1149 (2004) (Bowman, J., limiting *Gannon* to arbitrability).

[97] *See Pro Tech Industries, Inc. v. URS Corp.*, 377 F.3d 868, 871 (8th Cir. 2004); *Faber v. Menard, Inc.*, 367 F.3d 1048, 1052 (8th Cir. 2004); *Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821, 824 (8th Cir. 2003).

[98] Resp. App. 1a.

[99] *Gannon*, 262 F.3d at 681.

whether the invalid punitive-damages limitation fell under Missouri's public policy exception to the severance rule. Thus, *Gannon*'s statement is *dictum*. And this "Court does not decide important questions of law by cursory *dicta* inserted in unrelated cases."[100]

The Eighth Circuit held that EMC and the Starks limited the punitive-damages waiver in this case to negligent torts.[101] It did not hold, as EMC claims, that Missouri law prohibits punitive-damages waivers *per se*. *Gannon*'s *dictum* does not distinguish punitive damages for intentional torts and for negligence. So no conflict exists for this Court to resolve, even if it wanted to.

D. Even if in conflict with local law, the Court does not review cases where a circuit court reaches a reasonable result.

Finally, EMC argues that the Eighth Circuit misapplied Missouri law on punitive-damages waivers. Yet this Court is "extremely reluctant to accept review of court of appeals decisions alleged to conflict with applicable local law on the grounds of misapplication of state statutes and rules of decision, such as those relating to negligence, contracts, and property."[102] If the lower court reached a reasonable result, this Court declines review.[103] The Eighth Circuit simply followed an *en banc* Missouri Supreme Court case holding that one may not exonerate oneself from liability for future intentional torts.[104] Since the result is reasonable, no review is necessary.

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[100] *Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968).

[101] Pet. App. 14a.

[102] ROBERT L. STERN, SUPREME COURT PRACTICE (8th ed.) at 242.

[103] ROBERT L. STERN, SUPREME COURT PRACTICE (8th ed.) at 242.

[104] *Alack v. Vic Tanny Int'l of Missouri, Inc.*, 923 S.W.2d 330 (Mo. Banc. 1996).

EMC protests about an intracircuit conflict, but its dissatisfaction with the result actually drives this latest appeal. With this petition, EMC attempts again to delay the case's just conclusion.

3. The Court should not use this case to set precedent because it is fact specific.

A. The facts are unusual.

EMC invaded the Starks' home during arbitration. Thankfully, other multibillion dollar debt collection corporations do not break into debtors' homes—especially during arbitration proceedings. Similar cases have never arisen. EMC can cite no case factually on point. Because the facts are unusual, even if the Court wanted to address the questions presented, this case makes a bad vehicle.

B. The case does not raise important federal-law issues.

The Court recently declined to decide if parties may contract in arbitration for more judicial review than the FAA provides.[105] Despite the acknowledged circuit split in *Schoch v. InfoUSA, Inc.*, the Court found the question presented unworthy of review. No circuit court has cited this case. Lenders still arbitrate. If the acknowledged circuit split identified in *Schoch* is not worthy of review, then this simple confirmation case is not worthy either.

EMC argues that this case is important because it thought it was immune from punitive damages, even for intentional torts. But importance relates to the public, not to the parties involved.[106] EMC's misunderstanding of its own loan documents does not make this case important to the public.

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[105] *Schoch v. Infousa, Inc.*, 341 F.3d 785 (8th Cir. 2003), *cert. denied*, 540 U.S. 1180 (2004).

[106] *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

This case is not even important to EMC. EMC howls about the award, but it has easily paid it. In fact, EMC argued in the district court that it should not have to post a bond because it is so wealthy it can easily pay the award.[107] EMC said it would pay the award from Bear Stearns $7.4 billion in stockholder's equity.[108] When the district court ordered EMC to post a bond or pay the award into the court registry, EMC immediately paid the entire award. According to the income statements EMC provided during arbitration, it makes enough profit to pay this award by noon—everyday.

C. The Court should not grant certiorari to review the facts and supplant Judge Mason's contract construction.

EMC asks the Court to grant certiorari to review this case's facts. EMC claims it legally broke into the Starks' home under its loan documents. Yet, two levels of federal courts concur with the facts determined by Judge Mason. This Court has often held that "[a] court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."[109] Further, the Court has held, "[w]e do not grant a certiorari to review evidence and discuss specific facts."[110]

Because EMC disagrees with the Eighth Circuit, it argues this Court should construe the arbitration contract differently.

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[107] EMC's Motion to Stay Execution, filed November 23, 2004.

[108] *Id.*

[109] *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949) and cases cited; *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996) (declining to reconsider lower court's factual conclusions).

[110] *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J.).

Yet, this Court usually denies certiorari when a lower court decision turns upon how it construed a particular contract.[111]

EMC also complains that its chosen arbitrator, Judge Mason, wrongly decided the punitive-damages issue. As the Eighth Circuit pointed out, "[a]fter extensive briefing, the arbitrator concluded the limitation was ambiguous and construed the language against EMC."[112] In *PacifiCare Health Systems, Inc. v. Book*, this Court unanimously held that the arbitrator—not the district court—must decide if punitive-damages limits in arbitration agreements are ambiguous.[113] Now that the Eighth Circuit has rejected its request, EMC asks this Court to supplant Judge Mason's construction with its contract construction. But parties may challenge an award only on three grounds:

- the statutory bases in the FAA;
- under the manifest-disregard-of-law analysis; and
- under the complete-irrationality test.

EMC does not even argue these points in its petition. The parties bargained for Judge Mason's contract construction. As Judge Easterbrook pointed out, "the question for decision by a federal court asked to set aside an arbitration award . . . is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract."[114] Judge Mason interpreted the contract.

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[111] Robert L. Stern, Supreme Court Practice, 8th Ed., at 249.

[112] Pet. App. 3a.

[113] *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401, 406-407 (2003).

[114] *George Watts & Son Inc. v. Tiffany and Co.*, 248 F.3d 577, 579 (7th Cir. 2001) (quoting *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1194-95 (7th Cir. 1987); citing *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960)).

4. The Court must reject expanded judicial review of arbitrators because it would apply the Constitution to private contracts and cause more litigation.

Citing only jury cases, EMC argues the Court must expand the Constitution to cover private arbitration contracts. All circuit court arbitration cases addressing expanded judicial review have rejected it, either because arbitration is not state action or because parties waive their due-process rights when they voluntarily arbitrate disputes.[115] In this case, the arbitration agreement absolutely prohibits expanded judicial review. It says the arbitrator's award "shall be final" and is "nonappealable."[116] A party that voluntarily arbitrates its dispute does not bargain for our judicial system's benefits and protections.[117]

A. A private arbitrator imposing punitive damages is not state action.

The Court should reject EMC's suggestion that the Due Process Clause limits punitive damages in arbitration, because this would expand the Constitution to private contracts. The Eleventh Circuit holds that a private arbitrator imposing punitive damages is not state action.[118] This Court holds that FAA § 2 makes "arbitration agreements as enforceable as other contracts, but not more so."[119] Applying the Due Process Clause

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[115] *See Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 940 (10th Cir. 2001); *Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1193 (11th Cir. 1995); *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1064 (9th Cir. 1991).

[116] Pet. App. 40a.

[117] *Schoch v. Infousa, Inc.*, 341 F.3d 785, 791 (8th Cir. 2003), *cert. denied*, 540 U.S. 1180 (2004).

[118] *Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1191-92 (11th Cir. 1995).

[119] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

to this private arbitration contract would elevate it above other private contracts. Therefore, the Court should reject EMC's argument that the Due Process Clause applies to private arbitration contracts.

B. EMC waived its due-process rights by forcing the Starks to arbitrate.

Even if the Court considers the confirmation of an arbitration award state action, EMC has waived its due-process rights by forcing the Starks into arbitration.[120] If the parties voluntarily agreed to arbitrate their disputes, then they have waived their due-process rights.[121] Only those who opt for the judicial system's protections retain their due-process rights.

EMC cannot rely on jury cases for its constitutional arguments. Those who go before a jury retain their due-process rights. In fact, the Eleventh Circuit distinguished jury trials from private arbitration concluding that "the federal policy favoring arbitration, as well as the absence of the bias and runaway punitive awards prevalent in the jury context, distinguish the arbitral award in the present case from the jury award of punitive damages in *Honda Motor Co.*"[122] Notably, EMC cites only jury cases like *BMW* to support its constitutional arguments. EMC wants the Court to extend *BMW* to arbitration. The Court vacated six lower court decisions after *BMW*, but none of them were arbitration cases.[123] There is no precedent for extending *BMW* to arbitration.

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[120] *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 940 (10th Cir. 2001); *Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1193 (11th Cir. 1995); (both cases following *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1063-64 (9th Cir. 1991) (focusing on the voluntary nature of arbitration and rejecting a due-process challenge to arbitral punitive-damages award)).

[121] *Id.*

[122] *Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1193 (11th Cir. 1995).

[123] *See Sperau v. Ford Motor Co.*, 674 So.2d 24 (Ala. 1995), *vacated*, 517 U.S. 1217 (1996); *American Pioneer Life Ins. Co. v. Williamson*, 681 So.2d 1040 (Ala. 1995), *vacated*, 517 U.S. 1231 (1996); *Continental Trend Resources, Inc. v.*

(Cont'd)

C. Limiting judicial review, not expanding it, better serves the strong federal policy favoring arbitration.

EMC suggests the lack of due-process protection in arbitration will decrease the number of voluntary arbitrations,[124] but it provides no evidence that this case has affected the number of arbitrations. This Court has noted that parties agree to arbitrate because of the benefits historically received—expedition, simplicity, and reduced costs.[125] Even after this case, the chairman of the National Home Equity Mortgage Association, Mitchell Feinstein, said arbitration is "a simpler, cheaper, and quicker method for resolving legitimate disputes."[126] Feinstein lobbied Fannie Mae and Freddie Mac to stop their ban on mandatory-binding-arbitration clauses.[127] If parties believe choosing arbitration will embroil them in years of expanded judicial review, they will not arbitrate. Instead they will litigate. With expanded judicial review, arbitration will, at best, become merely one more phase of litigation.

In fact, the current trend in federal courts is to further limit judicial review of arbitrators, not expand it. Relying on

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OXY USA, Inc., 44 F.3d 1465 (10th Cir. 1995), *vacated*, 517 U.S. 1216 (1996); *Apache Corp. v. Moore*, 891 S.W.2d 671 (Tex. App. 1994), *vacated*, 517 U.S. 1217 (1996); *Union Sec. Life Ins. Co. v. Crocker*, 667 So.2d 688 (Ala. 1995), *vacated*, 517 U.S. 1230 (1996); *Life Ins. Co. of Georgia v. Johnson*, 684 So.2d 685 (Ala. 1996), *vacated*, 519 U.S. 923 (1996); *Johansen v. Combustion Eng'g, Inc.*, 834 F.Supp. 404 (S.D. Ga. 1993), *aff'd*, 67 F.3d 314 (11th Cir. 1995) (mem.), *vacated*, 517 U.S. 1217 (1996), *remanded*, 98 F.3d 1351 (11th Cir. 1996).

[124] Pet. 19.

[125] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

[126] Jody Shenn, *Just Clause? Arbitration In Subprime*, AMERICAN BANKER, Sept. 7, 2004, at 1.

[127] *Id.*

this Court's *Eastern Associated Coal Corp. v. United Mine Workers of America*,[128] Judge Easterbrook may have purged the Seventh Circuit of manifest-disregard-of-law analysis.[129] Under Judge Easterbrook's severely limited manifest-disregard-of-law analysis, if an arbitrator does not require the parties to violate the law, the award stands.[130] Commentators praise Judge Easterbrook for allowing "parties, arbitrators, and courts to realize the benefits of arbitration, while avoiding the drawbacks associated with the lack of finality in a decision."[131] But expanded judicial review denies the strong federal policy favoring arbitration this Court established 50 years ago. Expanded judicial review makes arbitration "yet another step on the ladder of litigation."[132]

D. The Court should not rely on *Sawtelle*, which is still on appeal.

To support its expanded judicial review argument, EMC cites *Sawtelle v. Waddell & Reed, Inc.*, the inferior New York state court.[133] The Supreme Court should not grant certiorari to review a federal circuit court decision merely because its result differs from an inferior state court's decision. Further, the *Sawtelle* case is still on appeal.[134] The Court should not rely

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[128] *Eastern Associated Coal Corp. v. United Mine Workers of America*, 531 U.S. 57 (2000).

[129] *George Watts & Son Inc. v. Tiffany and Co.*, 248 F.3d 577 (7th Cir. 2001).

[130] *Id.*

[131] Paul J. Krause, *Disregarding Manifest Disregard: Watts Shifts Standard for Vacating Arbitrators' Decisions*, DEFENSE COUNSEL JOURNAL, Jan. 2005, at 79.

[132] *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 n.7 (10th Cir. 2001).

[133] *Sawtelle v. Waddell & Reed, Inc.*, 754 N.Y.S.2d 264 (A.D. 1 Dept. 2003).

[134] Susanne Craig, *New Rule May Lead More Arbitrations Into the Courtroom*, WALL STREET JOURNAL (EASTERN EDITION), Feb 4, 2005 at C1; Telephone interview with Rose, secretary for Jeffrey L. Liddle, Mr. Sawtelle's lawyer (February 24, 2005).

on an lower court opinion that the higher court may reverse. Finally, *Sawtelle* does not even conflict with this case. The Eighth Circuit folded the *BMW* due-process analysis into its manifest-disregard-of-law analysis. *Sawtelle* followed the same reasoning, but simply reached a different result.

5. The Court should deny certiorari because the decision is correct.

The Court's primary concern is not correcting lower court errors. Rule 10 states the Court will rarely grant review where lower court has arguably misapplied a properly stated rule of law. Still, the decision below is correct.

The timeline in figure 2 shows what EMC knew when it drafted the arbitration agreement.[135] Since 1996, EMC was aware of the *Alack* decision, holding that one cannot waive punitive-damages claims for intentional torts.[136] In 1999, the parties signed the arbitration agreement, which incorporated *Alack*'s holding into its limited punitive-damages waiver. Now, post-*Gannon*, EMC can comfortably draft an arbitration agreement that contains a full waiver of punitive damages, knowing that, at worst, a federal court may sever the waiver and still enforce the arbitration agreement.[137] But in 1999, EMC did not know about *Gannon* because the Eighth Circuit did not decide it until 2001. This explains why EMC, always represented by excellent counsel, drafted a limited punitive-damages waiver, not a full one.

Having drafted the limited-punitive-damages waiver with Missouri law in mind, EMC should have realized that its intentional tort of breaking into the Starks' home would expose it to punitive damages. Yet, EMC states, "No one who signed

[135] Resp. App. 14a.

[136] *Alack v. Vic Tanny Int'l of Missouri, Inc.*, 923 S.W.2d 330 (Mo. 1996) (*en banc*).

[137] *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677 (8th Cir. 2001).

an arbitration agreement excluding punitive damages could have reasonably expected that its conduct could result in such punishment."[138] Not only did EMC sign the arbitration agreement – EMC wrote it. So, of all people, EMC should have known that it drafted a limited punitive-damages waiver. EMC knew an unlimited punitive-damages waiver would not be enforceable in Missouri under *Alack*. Further, it would run the risk that its entire arbitration agreement might be thrown out, as argued in *Gannon*.

The Eighth Circuit's decision is correct and restates settled law. The Eighth Circuit simply held that "an attempt to procure a waiver of punitive damages is an attempt to exonerate oneself from future liability for intentional torts or gross negligence, because the remedy of punitive damages would otherwise be available for such acts."[139] EMC's misunderstanding of its own loan documents is not a reason to reverse the Eighth Circuit. Therefore, the Court should deny certiorari.

6. The Court should deny certiorari because EMC has not preserved its questions presented for review.

A. EMC waived its due-process argument by not making it in the arbitration proceeding.

EMC has not preserved its due-process issue for review because it did not raise it before Judge Mason. This Court holds, once in arbitration, all issues are for the arbitrator to decide.[140] Therefore, Judge Mason decides if EMC received due process. EMC cannot raise issues for the first time on a motion to vacate the arbitration award in the district court.[141] During arbitration,

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[138] Pet. 16.

[139] Pet. App. 8a.

[140] *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401, 406-407 (2003) (punitive-damages waiver).

[141] *Gas Aggregation Servs., Inc. v. Howard Avista Energy, LLC*, 319 F.3d 1060, 1063 n.2 (8th Cir. 2003).

the Starks requested Judge Mason award $14.8 million in punitive damages.[142] EMC's lawyer knew about the punitive-damages request in arbitration. He stated, "this is the first time I have heard it was $14.8 million."[143] Even though EMC filed a closing arbitration brief, it did not raise the due-process argument before Judge Mason.[144] Instead, EMC waited until its motion to vacate the arbitration award.[145] Because EMC did not preserve its due-process argument for review, the Court should deny certiorari.

B. EMC did not press its questions presented before the Eighth Circuit either.

(1) EMC did not raise the supposed Gannon conflict.

EMC has not preserved its first question presented, which argues the Eighth Circuit interpreted Missouri law in a way conflicting with its own case, *Gannon v. Circuit City Stores, Inc.*[146] A question presented in the petition but not raised in the court of appeals is not properly before the Supreme Court.[147] In the Eighth Circuit, the Starks' argued that Missouri's *Alack v. Vic Tanny Int'l of Missouri, Inc.*[148] prevents EMC from exonerating itself from future liability for intentional torts. EMC responded to the Starks' argument,[149] but did not raise the supposed *Gannon* conflict in its appellate brief.[150] Because EMC did not

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[142] Appellee's Appendix, Vol. 2, at 394.

[143] *Id.*

[144] *See generally*, Respondent's Post-Hearing Brief in Arbitration (Nov. 15, 2002).

[145] Appellee's Appendix, Vol. 2, at 269.

[146] *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677 (8th Cir. 2001).

[147] *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981).

[148] *Alack v. Vic Tanny Int'l of Missouri, Inc.*, 923 S.W.2d 330 (Mo. 1996) (*en banc*).

[149] Appellee's Brief at 41 (responding to *Alack* argument).

[150] Appellee's Brief at 6-10 (Table of Authorities does not list *Gannon*).

raise the *Gannon* conflict before the Eighth Circuit panel, it did not preserve the question presented for review by this Court.[151]

EMC will argue it raised *Gannon* in its motion for rehearing before the Eighth Circuit. But EMC does not petition the Court to review the Eighth Circuit's rehearing denial. So the Court should deny the petition for certiorari.

(2) EMC did not ask the Eighth Circuit to expand judicial review beyond the manifest-disregard-of-law analysis.

Similarly, the Eighth Circuit did not decide EMC's second question presented, seeking expanded judicial review of arbitrators. If a party does not argue a question below, the Court need not address it.[152] EMC argued below that the punitive-damages award was excessive and, therefore, Judge Mason had manifestly disregarded the law.[153] EMC did not ask the Eighth Circuit to expand judicial review beyond the manifest-disregard-of-law analysis.

The Eighth Circuit did as EMC asked—folded due-process review into the manifest-disregard-of-law analysis.[154] Under that analysis, the Eighth Circuit held Judge Mason followed the law.[155] Now, having lost under that analysis, EMC argues that this Court must expand judicial review even more. But EMC did not preserve that issue for review, and, therefore, the Court should deny certiorari.[156]

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[151] *See Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981).

[152] *Yee v. City of Escondido, California*, 503 U.S. 519, 533 (1992) (substantive-due-process claim).

[153] Appellee's Brief, at 52.

[154] Pet. App. 11a.

[155] Pet. App. 11a-14a.

[156] *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981).

CONCLUSION

EMC forced the Starks to arbitrate. The Starks insisted that the arbitration agreement was unilateral, unfair and unconscionable.[157] Having demanded arbitration, the Court must presume EMC knew arbitration procedures differ from judicial procedures. Now, having lost in arbitration, EMC makes one last effort to change the result. In doing so, EMC has turned this arbitration into just "one more step on the ladder of litigation."[158] EMC will continue this litigation until it gets a result it likes.

To answer the questions presented, no, the Court should not review the supposed intracircuit conflict. First because the Court does not review intracircuit conflicts; second because there is no conflict. No, the Court should not expand the Constitution to private contracts. As stated in *Watts*, the arbitrator is the parties' mutual agent, chosen by them to resolve their disputes.[159] He is a private person acting under a private contract. There is no state action and no constitutional protection.

EMC cares only about the result, law or no law. Having lost in arbitration, EMC wants out. There is no other way to explain the spectacle of a multibillion dollar debt collection corporation, with 52,000 arbitration agreements just like this one,[160] arguing that the Court should expand judicial review of arbitrators. EMC's petition is a result in search of a rationale. It is an assault on arbitration.

The Court should deny the petition for writ of certiorari.

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[157] Appellant's App. at 108.

[158] *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 n.7 (10th Cir. 2001).

[159] *George Watts & Son Inc. v. Tiffany and Co.*, 248 F.3d 577, 580-81 (7th Cir. 2001).

[160] Pet. App. 25a.

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APPENDIX

APPENDIX – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED AUGUST 17, 2001

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 00-3243

MARKEN GANNON,

Plaintiff - Appellee,

v.

CIRCUIT CITY STORES, INC.,

Defendant - Appellant.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AMICUS ON BEHALF OF APPELLEE.

Submitted: April 13, 2001

Before Bowman and Fagg, Circuit Judges, and VIETOR,[1] District Judge.

The opinion of the court was delivered by: Bowman, Circuit Judge

Appeal from the United States District Court for the Eastern District of Missouri.

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1. The Honorable Harold D. Vietor, United States District Judge for the Southern District of Iowa, sitting by designation.

Appendix

This appeal presents the issue of whether a written agreement between an employee and employer to settle all employment-related disputes exclusively through binding arbitration remains enforceable after a provision within the agreement is found invalid. The District Court concluded that the inclusion of the invalid provision rendered the entire arbitration agreement unenforceable. We reverse.

I.

In May 1998, Marken Gannon applied for employment with Circuit City Stores, Inc., in Ellisville, Missouri. As a prerequisite to her employment, Circuit City presented Gannon with its Dispute Resolution Agreement for her to sign. The agreement provided that Gannon agreed to settle all employment-related claims against Circuit City exclusively through binding arbitration. The agreement advised her to familiarize herself with the rules and procedures under the agreement prior to signing. Terms in bold type informed Gannon that the agreement affected her legal rights and that she might want to seek legal advice before signing. It also stated that she could withdraw her consent up to three days after signing the agreement and specified how she could effectuate a withdrawal. Gannon signed the agreement and Circuit City hired her.

After approximately one year of employment, Circuit City terminated Gannon. Following her discharge, Gannon filed charges with the Equal Employment Opportunity Commission and the Missouri Commission on Human Rights alleging that during her employment with Circuit City she had encountered sexual harassment, a hostile work environment, sex discrimination, and retaliation. Upon receiving her right-to-sue letters from both agencies, she brought suit in federal court. Circuit City responded by filing a motion to dismiss the case and to compel

arbitration based on the arbitration agreement Gannon had signed. The District Court declined to compel arbitration. It determined that the entire agreement was unenforceable because it contained an invalid clause that limited punitive damages.[2] Circuit City filed a motion for reconsideration, arguing that it no longer enforced the punitive damages clause and that another provision in the agreement served to automatically strike terms judicially determined to be unenforceable. The District Court denied the motion and Circuit City appeals.[3] On appeal, Circuit City does not challenge the ruling that the punitive-damages clause is unenforceable, but argues that the clause should be severed and Gannon should be compelled to arbitrate her claims under the remaining terms of the agreement.

II.

Congress enacted the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16 (1994), "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991). The FAA declares that written agreements to resolve disputes through arbitration are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1994). The effect of the FAA was to "create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). In

2. The clause found invalid by the District Court limited punitive damages to five thousand dollars.

3. The Federal Arbitration Act explicitly provides us with jurisdiction to hear such interlocutory appeals. 9 U.S.C. § 16 (1994).

Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302 (2001), the Supreme Court held that the FAA's provisions apply to arbitration agreements covering employment-related claims. Id. at 1311 (holding that in the employment context "only contracts of employment of transportation workers" are exempted from the FAA's coverage). The FAA therefore governs Gannon's arbitration agreement with Circuit City and we undertake our review keeping in mind that the FAA evinces a "liberal federal policy favoring arbitration agreements." Moses H. Cone Mem'l Hosp., 460 U.S. at 24.

Our role in determining whether a court should compel arbitration is limited. We must determine simply whether the parties have entered a valid agreement to arbitrate and, if so, whether the existing dispute falls under the coverage of the agreement. Larry's United Super, Inc., v. Werries, 253 F.3d 1083, 1085 (8th Cir. 2001); Keymer v. Mgmt. Recruiters Int'l, Inc., 169 F.3d 501, 504 (8th Cir. 1999). Once we conclude that the parties have reached such an agreement, the FAA compels judicial enforcement of the arbitration agreement.

We review the District Court's interpretation of the arbitration agreement de novo, Lyster v. Ryan's Family Steak Houses, Inc., 239 F.3d 943, 945 (8th Cir. 2001), and we look to Missouri contract law to interpret the validity of the agreement. Id. at 946.

III.

The parties agree that they entered into an agreement to settle disputes through binding arbitration and that their agreement covers the present dispute. They contest, however, the validity of the agreement following the District Court's conclusion that one provision within the agreement was invalid. Circuit City contends that, under the terms of the arbitration agreement and Missouri

contract law, the invalid clause should be struck and Gannon should be compelled to arbitrate her claims in accordance with the remaining terms of the agreement. Gannon argues that the invalid provision renders the entire agreement unenforceable as a matter of public policy.

A.

"The primary rule in the interpretation of a contract [under Missouri law] is to ascertain the intention of the parties and to give effect to that intention." Speedie Food Mart, Inc. v. Taylor, 809 S.W.2d 126, 129 (Mo. Ct. App. 1991). When the contract is unambiguous, the intent of the parties should be determined from the instrument alone. Marshall v. Pyramid Dev. Corp., 855 S.W. 2d 403, 406 (Mo. Ct. App. 1993).

Rule 18 of the Circuit City arbitration agreement specifically states the intent of the parties in the event a provision within the agreement is found invalid. It provides that, "[i]n the event that any of these Dispute Resolution Rules and Procedures agreed upon by the Parties is held to be in conflict with a mandatory provision of applicable law, the conflicting Rule or Procedure shall be modified automatically to comply." It also states that "[i]n the event of an automatic modification with respect to a particular Rule or Procedure, the remainder of these Rules and Procedures shall not be affected." The terms of Rule 18 express an unambiguous intent by the parties to sever any terms determined to be invalid and to allow all claims to proceed to arbitration under the remaining provisions of the agreement.

Even if the parties had not recorded their intentions in the severability provision, Missouri contract law declares severance to be proper in this instance. "With respect to contracts which contain a forbidden or invalid

provision, our Supreme Court at an early date declared 'the general rule to be, that if the good be mixed with the bad, it shall nevertheless stand, provided a separation can be made.'" Kisling v. MFA Mut. Ins. Co., 399 S.W.2d 245, 250 (Mo. Ct. App. 1966) (quoting Koontz v. Hannibal Sav. & Ins. Co., 42 Mo. 126, 129 (1868)). The essence of the contract between Circuit City and Gannon is an agreement to settle their employment disputes through binding arbitration. The punitive-damages clause represents only one aspect of their agreement and can be severed without disturbing the primary intent of the parties to arbitrate their disputes. "[W]here one provision in a contract, which does not constitute its main or essential feature or purpose, is void . . . but is clearly separable and severable from the other parts which are relied upon, such other parts are not affected by the invalid provision, and may be enforced as if no such provision had been incorporated in the contract." Shibi v. Miller, 268 S.W. 434, 436 (Mo. Ct. App. 1925).

B.

Gannon argues that public-policy concerns override these contractual rules and require that we hold the entire arbitration agreement unenforceable.[4] Although Missouri common law ordinarily allows the severance of invalid terms, Gannon relies on a narrow exception that prohibits severance "where there is some 'all-pervading vice, such as fraud, or some unlawful act which is condemned by public policy or the common law and avoids all parts of the transaction because all are alike infected.'" Id. (quoting Koontz, 42 Mo. at 129).

She asserts that allowing severance of an invalid provision within an arbitration agreement falls within this

4. The Equal Employment Opportunity Commission, as amicus curiae, joins Gannon in this argument.

exception. According to Gannon, employers will be emboldened to include improper terms because employees will be forced either to arbitrate under the unfair terms or to go to court to get them removed from the agreement. Gannon claims that because severance provides employers with such an improper incentive, we must therefore hold the entire agreement unenforceable to discourage such behavior.

We disagree. The inclusion of the damages-limitation clause does not infect the agreement with any type of defect that requires us to invalidate the entire contract. We recognize that in certain situations one party may include so many invalid provisions that the validity of the entire agreement would be undermined. For example, in Hooters of America, Inc. v. Phillips, an entire arbitration agreement was found unenforceable because Hooters promulgated "so many biased rules" that it created "a sham system unworthy even of the name of arbitration." 173 F.3d 933, 940 (4th Cir. 1999). Circuit City's agreement does not, however, present such a case. Although Circuit City has not appealed the decision of the District Court that invalidated the punitive-damages provision,[5] this Court had no controlling precedent at the time the contract was executed, nor does it today, which states that such a limitation is necessarily invalid.[6]

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5. Circuit City has provided affidavit testimony that it has amended the rules and procedures of its arbitration agreements with its employees to exclude the provision limiting damages on front pay, back pay, and punitive damages and now authorizes arbitrators to award whatever relief would be available in court under the law. It therefore has no desire to appeal regarding the provision's validity.

6. In fact, we recently held in Larry's United Super, Inc., v. Werries, that the question of whether a waiver of RICO punitive damages in an arbitration agreement was valid remained a matter for arbitrators, not the courts, to decide in the first instance. See 253 F.3d 1083, 1086 (8th Cir. 2001).

Likewise, Missouri courts have not suggested that it is improper for parties to include such terms in their contracts. In these circumstances, the inclusion of the damages clause does not meet the public-policy exception prohibiting severance under Missouri contract law. See Kisling, 399 S.W.2d at 251 (rejecting public-policy argument where party failed to provide supporting legal authority); White v. McCoy Land Co., 87 S.W.2d 672, 685 (Mo. Ct. App. 1935) (embracing the proposition that only the state constitution, laws, or judicial decisions represent proper evidence of public policy).

With regard to Gannon's more general public-policy arguments, we note that the FAA limits our review of an arbitration agreement to determining whether a dispute is properly arbitrable, and our authority does not extend to the consideration of public- policy advantages or disadvantages resulting from the enforcement of the agreement. See Werries, 253 F.3d at 1086.

This is particularly true where controlling federal public policy has already been firmly established. The Supreme Court has recognized that "'[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that we rigorously enforce agreements to arbitrate.'" Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625-26 (1985) (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985)).

The boundaries of private arbitration agreements in the employment context are currently being set, with the Supreme Court only recently affirming that the FAA extends to arbitration agreements covering employment disputes. See Circuit City Stores, Inc., 121 S. Ct. at 1311. In an evolving climate such as this, if we were to hold

entire arbitration agreements unenforceable every time a particular term is held invalid, it would discourage parties from forming contracts under the FAA and severely chill parties from structuring their contracts in the most efficient manner for fear that minor terms eventually could be used to undermine the validity of the entire contract. Such an outcome would represent the antithesis of the "liberal federal policy favoring arbitration agreements." Moses H. Cone Mem'l Hosp., 460 U.S. at 24; see also Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) ("Arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."). Accordingly, we reject Gannon's public-policy arguments. [7]

By signing the arbitration contract, Gannon demonstrated her intent to resolve any employment disputes with Circuit City through binding arbitration. See Mitsubishi Motors Corp., 473 U.S. at 626 ("Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability."). We do not believe that the severance of the provision limiting punitive damages diminishes her contractual intent to arbitrate because excluding the provision only allows her the opportunity to arbitrate her

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7. We also disagree with Gannon's assertion that severance encourages employers to include improper terms in arbitration agreements. The parties' dispute over the enforceability of the arbitration agreement has caused many months of time-consuming and expensive litigation for both sides. The Supreme Court has long recognized that "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" Gilmer, 500 U.S. at 31 (quoting Mitsubishi, 473 U.S. at 628). Circuit City has now lost many of the advantages of arbitration because of the present dispute. We believe that these forfeitures belie the argument that severance encourages employers to insert problematic terms that likely will result in litigation.

claims under more favorable terms than those to which she agreed.[8]

IV.

Severing the punitive-damages clause is consistent with the terms of the contract, the intent of the parties, Missouri contract law, and the FAA's policy favoring the enforcement of arbitration agreements. We therefore reverse the judgment of the District Court and remand the case for further proceedings consistent with this opinion.[9]

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8. We recognize that the Eleventh Circuit has found public-policy arguments similar to those advanced by Gannon persuasive in holding that an arbitration agreement in the employment context is unenforceable because it included an invalid provision. See Perez v. Globe Airport Sec. Serv., Inc, 253 F.3d 1280, 1286-87 (11th Cir. 2001). To the extent that the court relied on these public-policy arguments for its holding we would disagree with the decision in Perez. We note that the arbitration agreement in Perez did not have a severability clause and that the case is distinguishable from the present case on that ground. See Perez, 253 F.3d at 1286 ("The Globe arbitration agreement does not contain a severability provision, and this court has previously rejected the contention that the policy favoring arbitration agreements requires that courts sever unlawful provisions, rather than void the agreement.").

9. Because the District Court concluded that the punitive-damages limitation was a sufficient ground for invalidating the entire arbitration agreement, it did not consider Gannon's argument that fee-sharing provisions in the agreement were also invalid. On remand, Gannon may renew her arguments concerning the fee-sharing provisions. If she does so, the District Court should consider her arguments in light of the Supreme Court's recent decision in Green Tree Financial Corp. v. Randolph, 531 U.S. 79, 92 (2000) (holding that "a party seek[ing] to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive . . . bears the burden of showing the likelihood of incurring such costs."). Under the terms of the arbitration agreement, which carefully limit the amount of fees that Gannon can incur, we think it doubtful that Gannon can succeed in an attack on the fee-sharing provisions. Moreover, were those provisions held invalid, in all likelihood they would be severable. But those questions are not before us, and we do not decide them in the present appeal.

Appendix

VIETOR, Senior District Judge, dissenting.

I respectfully dissent.

I believe public policy was violated by Circuit City when it placed in the arbitration agreement the extreme limitation on punitive damages.[10] The limit takes away all but $5,000 of the $300,000 maximum recovery available under Title VII. The Missouri Human Rights Act contains no limit on punitive damages. Circuit City's counsel conceded at oral argument that job applicants are not told that the punitive damages limitation is far less than the amount recoverable under the law.

The near-eradication of substantive recovery rights enacted by Congress and the Missouri legislature is, in my judgment, unconscionable. I think the Eleventh Circuit got it right in Perez v. Globe Airport Security Services, Inc., 253 F.3d 1280 (11th Cir. 2001), a decision with which the majority, in footnote 8, disagrees. The Perez court stated: "An arbitration agreement containing provisions that defeat a federal statute's remedial purpose is . . . not enforceable." Id. at 1287. An attempt by the employer to defeat the remedial purpose of Title VII taints the entire agreement, making it unenforceable. Id. For reasons expressed by the appellee in this case and by the Eleventh Circuit in Perez at 1287, severance of the offending provision and enforcement of the remainder of the agreement is not an appropriate resolution.

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10. The agreement to arbitrate was crafted by Circuit City, not by the parties. Ms. Gannon played no part in drafting the agreement. It was presented to her on a take-it- or-leave-it basis as a condition of gaining employment with Circuit City. She either signed or she did not get the job. Circuit City's job application form provided to Ms. Gannon clearly states: "Circuit City will not consider your application unless [the Dispute Resolution Agreement] is signed."

The majority expresses concern that "if we were to hold entire arbitration agreements unenforceable every time a particular term is held invalid, it would discourage parties from forming contracts under the FAA and severely chill parties from structuring their contracts in the most efficient manner for fear that minor terms eventually could be used to undermine the validity of the entire contract." I do not think so. An affirmance in this case would not send a message that entire arbitration agreements would be unenforceable "every time a particular term is held invalid" and would not engender a fear that "minor terms eventually could be used to undermine the validity of the entire contract." This case does not involve a procedural provision or a minor term of any sort. It involves a term that guts a major substantive remedy that Congress and the Missouri legislature chose to provide to employees. It is a term that seeks to drastically change the substantive law (in favor of the employer) that is to be applied in the arbitration process. That definitely is not minor.

I would affirm.

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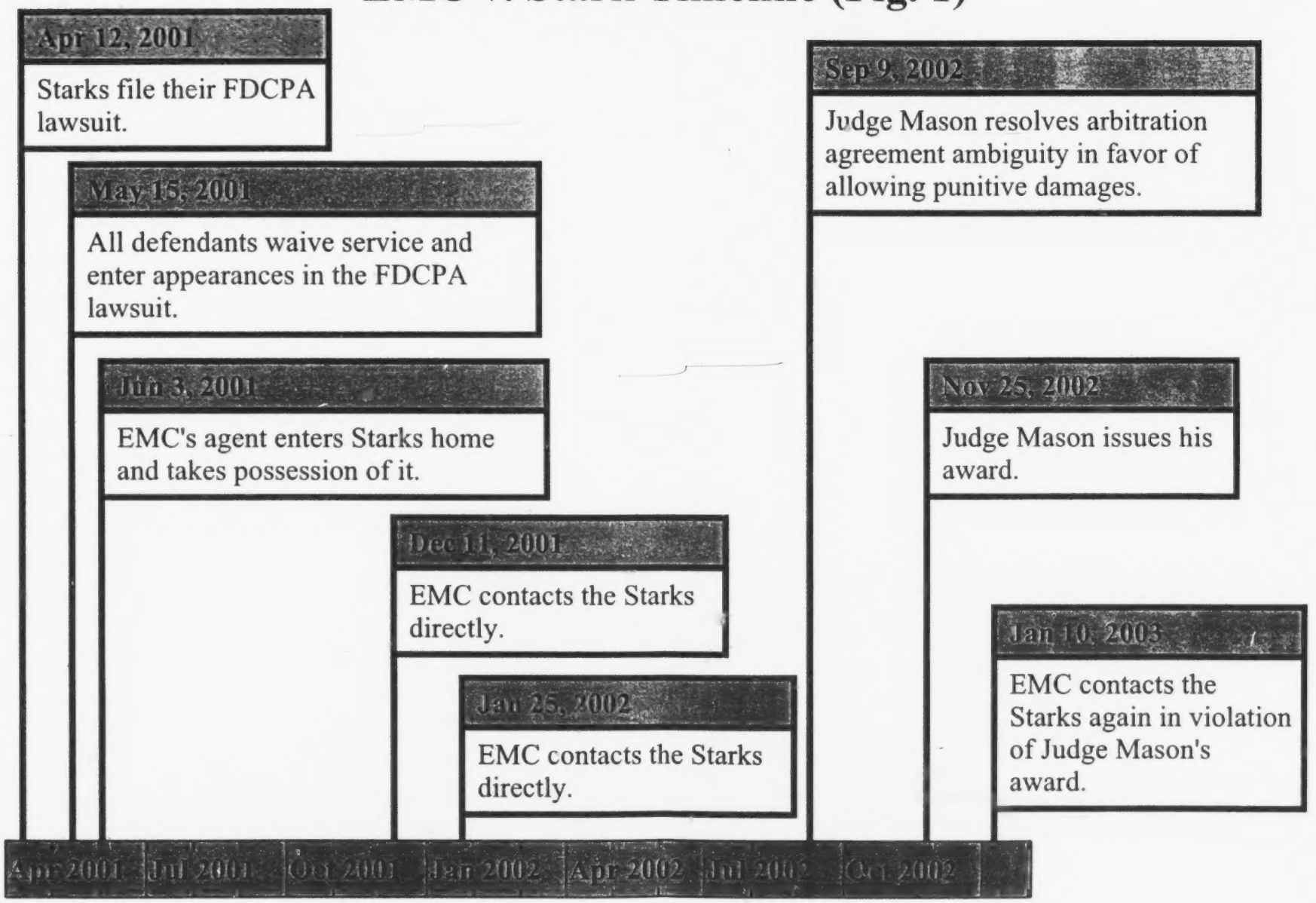
Appendix

EMC v. Stark Timeline (Fig. 1)



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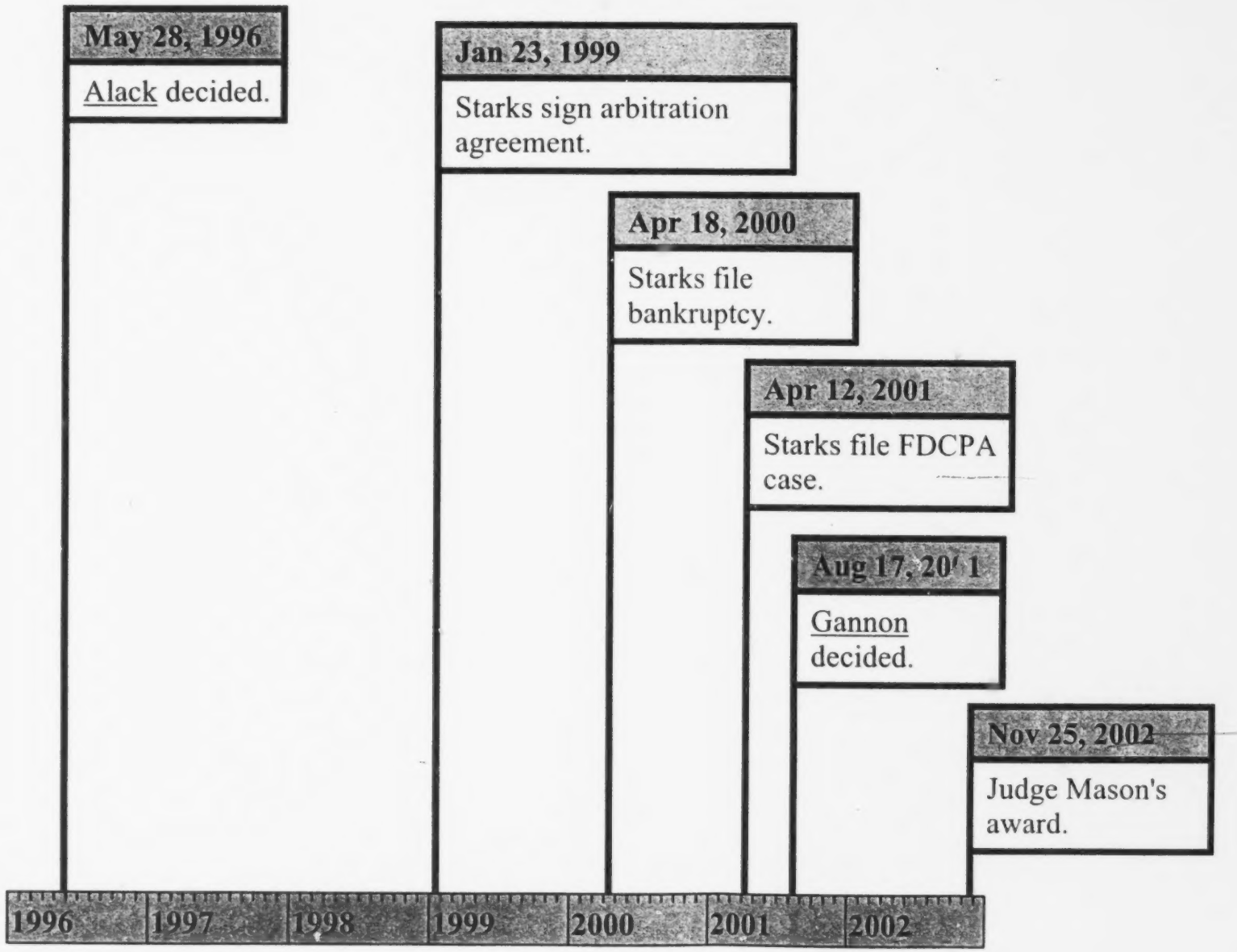
Appendix

Cases Timeline (Fig. 2)



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IN THE

Supreme Court of the United States

EMC MORTGAGE CORPORATION,

Petitioner,

v.

STANLEY WILLIAM STARK; PATRICIA GARNET STARK,

Respondents.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner EMC Mortgage Corporation ("EMC") respectfully files this reply to the brief in opposition filed by Respondents.[1] Respondents do not directly address the question whether the Eighth Circuit's decision deprived EMC of the "fair notice" to which it was constitutionally entitled when the court used an unforeseeable reading of state law to overturn the parties' express agreement that punitive damages could not be awarded by the arbitrator. Nor do Respondents squarely grapple with or defend the Eighth Circuit's enforcement of a 3000:1 punitive damages award that is invalid on its face under *BMW of North America v. Gore*, 517 U.S. 559 (1996), and its progeny. Yet it is these errors in the decision below that could well prove to be the "poison pill that will lead many companies to stop including arbitration provisions in their contracts," thereby thwarting the strong federal policy favoring arbitration. *See* Brief of Amici Curiae Chamber of Commerce of the United States, the American Financial Services Association, the Consumer Mortgage Coalition, and the Financial Services Roundtable's Housing Policy Council ("Chamber Brief") at 3-4.

Instead of addressing the issues set forth in the petition, Respondents mischaracterize the first question presented as raising nothing more than an intra-circuit split on a minor question of local or state law. The Eighth Circuit's statement in *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 681-82 (8th Cir. 2001), that "Missouri courts have not suggested that

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[1] EMC is hereby filing, concurrently with this Reply Brief, an express waiver of its right to file a Brief in Opposition to the conditional cross-petition for a writ of certiorari filed by Respondents and Cross-Petitioners in Docket No. 04-1184 (*Stark v. EMC Mortgage Corporation*). That conditional cross-petition asks this Court to engage in fact-bound error correction of the Eighth Circuit's unpublished and summary order rejecting Respondents' contention that they are entitled to 9% prejudgment interest under Missouri law.

it is improper for parties to include . . . terms [limiting the availability of punitive damages] in their [arbitration] contracts," *id.*, is certainly relevant to the first question raised by EMC in its Petition. But the relevance does not lie in the fact that *Gannon* is part of an intra-circuit conflict. Rather, *Gannon* merely confirms that the Eighth Circuit used an unprecedented and unforeseeable reading of state law to deprive the parties of fair notice of the enforceability of their own arbitration agreement.

Respondents also make no real attempt to defend the merits of the Eighth Circuit's tenuous and elliptical one-paragraph analysis of the proportionality and sheer magnitude of the 3000:1, $6 million punitive damage award in this case. Tellingly, Respondents simply rehash the view espoused by some courts that arbitral awards of punitive damages—even wildly disproportionate awards confirmed and enforced by federal or state courts—are immune from judicial scrutiny because no state action is supposedly involved or because the parties purportedly waived their due process rights by entering into arbitration. Yet by doing so, Respondents have only underscored the division and confusion amongst the lower courts regarding the proper measure of scrutiny courts should apply to arbitral awards of punitive damages that, on their face, never could have been awarded in the first instance by courts. *See* Petition at 23-26 (citing cases). Respondents have, in other words, only highlighted the need for immediate guidance and review by this Court.

I. The Unforeseeable Reading Of State Law Relied Upon By The Eighth Circuit To Reinstate The Arbitral Award of Punitive Damages In This Case Deprived Petitioner Of The "Fair Notice" To Which It Was Constitutionally Entitled, Under This Court's Recent Decision In *State Farm v. Campbell*.

Respondents never come to terms with the central point underlying the first question presented in EMC's Petition: namely that, prior to the Eighth Circuit's deeply flawed deci-

sion in this case, there was not even a hint of notice to parties negotiating an arbitration agreement that the applicable law prohibited them not only from waiving their *liability* for entire claims or causes of action sounding in tort, but also from limiting or waiving particular *forms of relief* that might be available under such claims. Instead of directly addressing this critical point, Respondents mischaracterize the first question presented, omit any reference to the "fair notice" principle on which it is based, and attempt to ascribe to EMC the "straw man" argument that review should be granted because of an intra-circuit split on a question of local or state law between the Eighth Circuit's decision in this case and its decision three years earlier in *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677 (8th Cir. 2001).

1. The following statement in *Gannon* conflicts with the central premise of the Eighth Circuit's decision in this case: "Missouri courts have not suggested that it is improper for parties to include . . . terms [limiting the availability of punitive damages] in their [arbitration] contracts." 262 F.3d at 681-82. In characterizing this statement as non-binding dicta, Respondents miss its significance, for *Gannon* simply confirms what was already the case—that EMC could not possibly have been on fair notice of the supposed Missouri-law prohibition on bargained-for limitations on particular forms of relief.[2] None of the cases or authorities cited by the Eighth Circuit or by Respondents, including the Missouri Supreme Court's decision in *Alack v. Vic Tanny International of Missouri, Inc.*, 923 S.W.2d 330 (Mo. 1996), suggest

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[2] Respondents also suggest that *Gannon* is distinguishable because it "does not distinguish punitive damages for intentional torts and for negligence," whereas in the instant case "[t]he Eighth Circuit" supposedly "held that EMC and the Starks limited the punitive-damages waiver in this case to negligent torts." Opp. at 18 (citing Pet. App. 14a). However, there is no support, either on the page cited by Respondents or anywhere else in the Eighth Circuit's opinion, for the proposition that the Eighth Circuit "held that EMC and the Starks limited the punitive-damages waiver in this case to negligent torts."

otherwise. All of them deal with the separate and very different question of whether parties may waive their *liability* for entire "claims" or causes of action sounding in tort. *Id.* at 337-38. *See* Petition at 12-15 (also noting that courts have "recognize[d] that there are differences between a contract which insulates a party from liability and one which merely places a limit upon that liability").[3]

Consequently, EMC was deprived of the "fair notice" to which it was constitutionally entitled "'not only of the conduct that will subject [it] to punishment, but also of the severity of the penalty that a State may impose.'" *State Farm v. Campbell*, 538 U.S. 408, 416-17 (2003) (quoting *Gore*, 517 U.S. at 564). One of the "alternative bases" offered by Respondents in support of the Eighth Circuit's decision in this case—the Eighth Circuit's alternative holding that even if the arbitration agreement was ambiguous as to the awardability of punitive damages, the arbitrator's resolution of that ambiguity was not clearly irrational—is therefore inextricably intertwined with the first question presented in EMC's Petition. After all, the rationality of the arbitrator's resolution of this supposed ambiguity obviously turns on the tenability and foreseeability of the Eighth Circuit's unprecedented reading of Missouri law, of which the parties could not have been on fair notice when they entered into the arbitration agreement in this case.

2. As the amici have noted, even apart from the fair-notice principle grounded in the Due Process Clause, the novel and unprecedented reading of state law sprung upon EMC by the Eighth Circuit and the arbitrator in this case should be deemed preempted by the Federal Arbitration Act (FAA). If parties are unable to bargain for, establish, and

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[3] Respondents also argue that *Gannon* has subsequently been limited to questions of "arbitrability," Opp. at 16-17. As for this supposed limitation, nothing more need be said than that this Court in *Mastrobuono v. Shearson Lehman Hutton, Inc.* treated the awardability of punitive damages by an arbitrator as a question of "arbitrability" to be resolved by the court. 514 U.S. 52, 58 (1995).

rely with certainty upon "the rules under which . . . arbitration will be conducted," and with fair notice of any state-law rules (supposed or actual) that might trump such freely bargained-for contractual rules, then it will become more "difficult for parties to enter into arbitration agreements," contrary to the strong federal policy in favor of arbitration. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (citation omitted); Chamber Brief at 7, cited *supra*.

II. This Court Should Grant Review To Clarify The Threshold For Judicial Scrutiny And Invalidation Of Arbitral Awards Of Punitive Damages That Flatly Violate This Court's Due Process Guideposts.

1. Respondents make little, if any, real attempt to defend, on its merits, the Eighth Circuit's elliptical and erroneous one-paragraph affirmance of the proportionality of the 3000:1, $6 million punitive damages award in this case, under the due process standards enunciated by this Court in *BMW v. Gore* and *State Farm*. *See, e.g.*, Opp. at 15 (reiterating the Eighth Circuit's flawed reliance on EMC's supposed net worth as a justification for the award, even though wealth "bear[s] no relation to the award's reasonableness or proportionality to the harm," and simply "'provides an open-ended basis for inflating awards when the defendant is wealthy,'" *State Farm*, 538 U.S. at 427-28 (citations omitted)).[4]

Rather than defend the constitutionality of the order enforcing the award, Respondents reiterate the position taken by some courts that there should be no judicial scrutiny of arbitral awards of punitive damages—even when courts confirm and enforce such awards, and when such awards could

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[4] Respondents contend that the Petition misstates the amount of actual damages awarded as $1,000. *See* Opp. at 11. In fact, the Petition correctly notes that a total of $2,000 was awarded in actual damages, making the ratio of punitive damages to actual damages 3000:1. *See* Petition at 6.

never have been made by courts in the first instance. Respondents also speculate that requiring courts to confirm and enforce arbitral awards that are subject to no or minimalist judicial scrutiny will somehow advance the federal policy favoring arbitration. *See* Opp. at 22-25. In doing so, however, Respondents only underscore the need for immediate review by this Court to clarify the measure of scrutiny courts should apply to arbitral awards of punitive damages that, on their face, could not pass constitutional muster under *BMW* and *State Farm* had they been imposed by the court itself in the first instance.

2. Reprising the no-state-action or voluntary-waiver-of-due-process-rights approaches taken by some courts that refuse to scrutinize at all the arbitral awards that they confirm and enforce simply highlights the confusion and division amongst the lower courts as to the proper measure of judicial scrutiny (if any) to apply to arbitral awards of punitive damages. *See* Petition at 23-26 (citing cases); *see also George Watts & Son, Inc. v. Tiffany and Co.*, 248 F.3d 577, 580 (7th Cir. 2001) (Easterbrook, J.) (referring to the "conflicting lines of precedent" regarding the "'manifest disregard of the law'" standard of scrutiny, and noting that "[t]he law in other circuits is similarly confused, doubtless because the Supreme Court has been opaque");[5] *cf. also* Chamber Brief at 12-13 (discussing the confusion and disarray amongst lower courts with respect to "a number of" other "recent lower-court cases that have had the effect of substantially reducing the attractiveness of arbitration on the basis of at-best arguable interpretations of state law").[6]

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[5] "The dictum in *Wilko [v. Swan*, 346 U.S. 427 (1953)] and *First Options [of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995)] was unexplained and unilluminated by any concrete application. Dictum in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 n. 4 (1991), is similarly unhelpful." *George Watts & Son, Inc.*, 248 F.3d at 580.

[6] Respondents suggest that this Court's recent denial of certiorari in *Schoch v. InfoUSA, Inc.*, 341 F.3d 785 (8th Cir. 2003), *cert.*

Most courts, including the Eighth Circuit in this case, have declined to adopt the extreme no-scrutiny position advocated by Respondents. *See id.* (citing cases). To suggest, as Respondents do, that courts confirming and enforcing arbitral awards of punitive damages should not scrutinize them at all—because such awards supposedly do not involve any state action—is to ignore the critical role courts and other governmental actors play in that confirmation and *enforcement* process. It is only through judicial enforcement, under a process created by statute, that arbitral awards of punitive damages have any consequence. *See, e.g.*, Chamber Brief at 11 ("It is the *confirming court itself* that is denying the respondent its right to due process by confirming an excessive award of punitive damages.") (citing *Shelley v. Kraemer*, 334 U.S. 1 (1948),[7] and Richard C. Reuben, *Public Justice: To-*

[Footnote continued from previous page]

denied, 540 U.S. 1180 (2004), warrants the same outcome here because of the supposed closeness of the question presented in *Schoch*: namely, whether "parties may contract in arbitration for more judicial review than the FAA provides." Opp. at 19 and n. 105. Even if one were to treat denials of certiorari as precedential, which they are not, and even if one were to treat that question as similar to the questions presented in this case, which it is not, Respondents' suggestion is bereft of merit for the simple reason that in *Schoch*, the question that Respondents claim was presented for this Court's review was not actually presented. *See* 341 F.3d at 789-90 (explaining that the court did not need to reach the question whether the parties could have validly contracted for de novo review by the district court of the arbitrator's ruling, "[b]ecause the parties did not 'clearly and unmistakably' express an intent to have the district court review de novo the arbitrator's award").

[7] As this Court explained in *Shelley v. Kraemer* in the analogous context of enforcement by *state* courts of the outcome of privately negotiated contractual arrangements: "That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court." 334 U.S. 1, 14 (1948) (citations omitted). Here, as in *Shelley*, "[i]t is clear that but for the active

ward a State Action Theory of Alternative Dispute Resolution, 85 CAL. L. REV. 577, 619-629 (1997)).[8]

Significantly, some courts, such as the Second and District of Columbia Circuits, have applied the "manifest disregard of the law" standard in a rigorous way with respect to arbitral resolutions of statutory rights. It therefore follows that such scrutiny should be applied to arbitral resolutions (here, denials, to be precise) of *constitutional* rights. Even if it does not, plain violations of the due process right to be free from arbitrary deprivations of property through constitutionally excessive awards of punitive damages should nonetheless be overturned under even the most deferential standard of review available to courts. *Cf. Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law.") (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 406 (1990)).

3. Again, here, as even Respondents acknowledge, the sole basis for the award of punitive damages in this case was the posting of a sign in the front window of Respondents' vacant house stating as follows: "'Property has been secured and winterized. Not for sale or rent. In case of emergency

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[Footnote continued from previous page]

intervention of the . . . courts, supported by the full panoply of state power," EMC would not actually be deprived of its property in an arbitrary and excessive manner, as it has been by the Eighth Circuit here. *Id.* at 19.

[8] Respondents' suggestion that EMC waived its challenge, under *BMW* and *State Farm*, to the excessiveness of the 3000:1 punitive damage award in this case is meritless. EMC clearly and vigorously argued the excessiveness, under the Due Process Clause, of the arbitral award of punitive damages in this case when this issue first arose—*i.e.*, when courts were called upon to confirm and enforce the award. *See, e.g.*, Appellants' Appendix ("AA") 269-271 (district court); Appellee's Brief at 52-55 (court of appeals); Appellee's Petition for Rehearing at 9-13. In any event, EMC also argued to the arbitrator the requirement of proportionality even before the arbitrator imposed any punitive damages award. *See, e.g.*, AA 563-64; Appellee's Appendix at 394.

call 1st American (732) 363-3626.'" *See* Petition at 3, 19 (quoting Pet. App. 3a); *see also* Opp. at 6 (stating that punitive damages were awarded under the state-law claim for intentional infliction of emotional distress, and not the FDCPA). Respondents do not dispute that this sign-posting occurred only once, nor do they dispute that the sign-posting did not "evinc[e] an indifference to or a reckless disregard of the health or safety of others." *State Farm*, 538 U.S. at 419 (citation omitted). Under the first prong of *State Farm*'s proportionality analysis then, the "degree of reprehensibility" of EMC's conduct leading to the punitive-damage award was minimal, at best. *See* Petition at 20-21 (explaining why the 3000:1, $6 million punitive-damage award in this case would be invalid on its face under the three-prong excessiveness analysis set forth by *State Farm*).

4. Given that arbitral awards of punitive damages can occasionally depart as markedly as the award did here from the range that any court could permissibly impose in the first instance, it is difficult to credit Respondents' speculation that cutting off judicial review of the excessiveness of arbitral awards of punitive damages would promote the strong federal policy favoring arbitration. *See* Opp. at 24-25 (contending that greater "expedition, simplicity, and reduced costs" would result from requiring courts to rubber-stamp the magnitude of arbitral awards when courts confirm and enforce such awards).

It seems far more likely that this supposed benefit from non-existent review would be outweighed by the *ex ante* chilling effect of entering into arbitration agreements without any meaningful protection from outlier awards of punitive damages. *See, e.g.*, Chamber Brief at 9-10 (given that empirical studies do "not support the hypothesis that juries award larger punitive [damage] awards than arbitrators" do, "contracting parties may well decide that the risk of a massive punitive [damage] award being assessed against them outweighs the possible benefits of arbitration," "if an arbitrator's award of punitive damages is subject to no review (or to only extremely limited review) by a confirming court"); Dan

Schechter, *Arbitrator's $6 Million Punitive Damage Award Against Lender Is Upheld, Despite 3000-to-1 Ratio; Punitive Damage Waiver Invalid Under State Law*, COMM. FIN. NEWSLETTER, Sept. 13, 2004, at 64 (predicting that the Eighth Circuit's decision in this case will not "withstand scrutiny," but cautioning businesses to "think twice about arbitration agreements," and suggesting that "[i]t might be better to draft a really good jury waiver and then have the case tried to a judge, subject to all of the usual rules of evidence and due process"); *cf. George Watts & Son, Inc. v. Tiffany and Co.*, 248 F.3d 577, 584 (7th Cir. 2001) (Williams, J., concurring in the judgment) ("when the arbitrator acts in manifest disregard of statutory law, there is no compelling reason that we should not intervene and protect the statutory rights of the parties—otherwise the parties would be better off flipping a coin").

In any event, whether Respondents' no-scrutiny position or the meaningful scrutiny advocated by EMC would best advance the strong federal policy favoring arbitration is a question on the merits that should be resolved by this Court.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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No. 04-1056

In the Supreme Court of the United States

EMC MORTGAGE CORPORATION,

Petitioner,

v.

STANLEY WILLIAM STARK and PATRICIA GARNET STARK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE AMERICAN FINANCIAL SERVICES ASSOCIATION, THE CONSUMER MORTGAGE COALITION, AND THE FINANCIAL SERVICES ROUNDTABLE'S HOUSING POLICY COUNCIL FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2(b), the Chamber of Commerce of the United States, the American Financial Services Association, the Consumer Mortgage Coalition, and the Financial Services Roundtable's Housing Policy Council respectfully move for leave to submit the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari filed by petitioner EMC Mortgage Corporation. Consent to the filing of this *amicus* brief was granted by counsel for petitioner but was denied by counsel for respondents.

The Chamber of Commerce of the United States (the "Chamber") is the world's largest business federation, representing an underlying membership of more than 3,000,000 businesses and organizations of all sizes. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus* briefs in numerous cases that have raised issues of vital concern to the nation's business community. In particular, the Chamber has been involved in a wide variety of cases involving the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-15, and has repeatedly appeared as an *amicus* in this Court in such cases—most recently in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003), and *PacifiCare Health Systems, Inc.* v. *Book*, 538 U.S. 401 (2003). The Chamber was one of a number of groups that filed a joint *amicus* brief in the Eighth Circuit in this case, urging that court to grant rehearing.

The American Financial Services Association ("AFSA") is the national trade association for market-funded providers of financial services to consumers and small businesses.

AFSA's membership includes over 500 diversified financial-services companies that offer an array of financial services, including personal, automobile, and home-equity loans and credit cards. AFSA joined the *amicus* brief in the Eighth Circuit in this case.

The Consumer Mortgage Coalition ("CMC") is a trade association of national mortgage lenders, mortgage servicers, and mortgage origination-service providers, committed to the nationwide rationalization of consumer mortgage laws and regulations. CMC, too, joined the *amicus* brief in the court below.

The Housing Policy Council ("HPC") is an operating division of the Financial Services Roundtable, whose membership originates well over half of the residential mortgages in the United States. It represents its membership in all matters relating to home mortgages in regulatory, legislative, and judicial fora, and also joined the *amicus* brief in the court below.

Many of the members, constituent organizations, and affiliates of the *amici* have adopted as standard features of their business contracts provisions that in appropriate circumstances mandate the arbitration of disputes arising from or relating to those contracts. They use arbitration because it is a prompt, fair, inexpensive, and effective method of resolving disputes with consumers and other contracting parties. By adopting an entirely implausible interpretation of an arbitration agreement and then refusing to review a massive award of punitive damages for consistency with due process, the Eighth Circuit's decision significantly undermines the benefits of arbitration. Were that decision to stand, it could easily prove to be a poison pill that causes the *amici*'s members to give up on arbitration altogether. Because such an outcome is in no one's interest and flies directly in the face of the policies animating the FAA, *amici* have a strong interest in the issues presented in the petition. *Amici* believe that their par-

ticipation will assist the Court in its resolution of the issues presented in this case.

For the reasons stated above, the Chamber, AFSA, CMC, and HPC respectfully request that the Court grant their motion for leave to file this brief.

Respectfully submitted.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE AMERICAN FINANCIAL SERVICES ASSOCIATION, THE CONSUMER MORTGAGE COALITION, AND THE FINANCIAL SERVICES ROUNDTABLE'S HOUSING POLICY COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Chamber of Commerce of the United States, the American Financial Services Association, the Consumer Mortgage Coalition, and the Financial Services Roundtable's Housing Policy Council submit this brief as *amici curiae* in support of the petition for a writ of certiorari filed by EMC Mortgage Corporation.[1]

INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States (the "Chamber") is the world's largest business federation, representing an underlying membership of more than 3,000,000 businesses and organizations of all sizes. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus* briefs in numerous cases that have raised issues of vital concern to the nation's business community. In particular, the Chamber has been involved in a wide variety of cases involving the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-15, and has re-

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party to this case authored this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

peatedly appeared as an *amicus* in this Court in such cases—most recently in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003), and *PacifiCare Health Systems, Inc.* v. *Book*, 538 U.S. 401 (2003). The Chamber was one of a number of groups that filed a joint *amicus* brief in the Eighth Circuit in this case, urging that court to grant rehearing.

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The Consumer Mortgage Coalition ("CMC") is a trade association of national mortgage lenders, mortgage servicers, and mortgage origination-service providers, committed to the nationwide rationalization of consumer mortgage laws and regulations. CMC, too, joined the *amicus* brief in the court below.

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Many of the members, constituent organizations, and affiliates of the *amici* have adopted as standard features of their business contracts provisions that in appropriate circumstances mandate the arbitration of disputes arising from or relating to those contracts. They use arbitration because it is a prompt, fair, inexpensive, and effective method of resolving disputes with consumers and other contracting parties. By adopting an entirely implausible interpretation of an arbitra-

tion agreement and then refusing to review a massive award of punitive damages for consistency with due process, the Eighth Circuit's decision significantly undermines the benefits of arbitration. Were that decision to stand, it could easily prove to be a poison pill that causes the *amici*'s members to give up on arbitration altogether. Because such an outcome is in no one's interest and flies directly in the face of the policies animating the FAA, *amici* have a strong interest in the issues presented in the petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

The "liberal federal policy favoring arbitration agreements" (*EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 288-289 (2002) (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)) would be entirely undermined by a rule that causes parties to stop including arbitration provisions in their contracts. But that is precisely what might happen were the Eighth Circuit's decision to stand.

As petitioner has explained, there are two distinct flaws in the court of appeals' decision: the lower court went far out of its way to interpret the parties' arbitration agreement and Missouri law to allow the arbitrator to award punitive damages at all, and then compounded that error by erroneously holding that the amount of punitive damages awarded by an arbitrator is not subject to review for excessiveness under the standards set forth in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), and *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996).

Petitioner has demonstrated that each of these issues independently warrants this Court's attention, and the combination of the two renders further review particularly important. Review is also imperative for another reason: the court of appeals' decision—and in particular its refusal to subject the size of an arbitrator's punitive-damages award to careful scrutiny—could prove to be a poison pill that will lead many

companies to stop including arbitration provisions in their contracts. Given the real benefits that arbitration provides to businesses, consumers and the court system, and the attendant strong federal policy favoring arbitration, that result would be a travesty. Thus, this Court should grant certiorari and reverse the decision below.

ARGUMENT

THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER COURTS MUST ENSURE THAT ANY AWARD OF PUNITIVE DAMAGES BY AN ARBITRATOR COMPORTS WITH DUE PROCESS.

A. Federal Policy Encourages Contracting Parties To Agree To Mandatory Arbitration Clauses.

1. Arbitration is a process in which "one or more third-party neutrals review facts and arguments from both sides during an adversarial hearing, apply legal standards, and render a decision on the merits." 3 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 42.4(c)(2) (Robert L. Haig ed. 1998). This alternative to traditional litigation for resolving disputes has long received the law's endorsement. In particular, the FAA, enacted in 1925, established "a liberal federal policy favoring arbitration agreements." *Moses H. Cone*, 460 U.S. at 24-25.

In enacting the FAA, Congress believed that by eliminating the delay and expense of litigation, arbitration would "appeal to big business and little business alike, * * * corporate interests [and] individuals." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995) (quoting S. REP. NO. 68-536, at 3 (1924)). To that end, the FAA requires "courts to enforce arbitration agreements into which parties had entered and to place such agreements upon the same footing as other contracts." *Id.* at 271 (internal quotation marks, alterations and citations omitted).

2. There are many reasons why parties to a contract might agree to arbitrate disputes arising from their business relationship rather than proceed to court. Arbitration "'is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearing and discovery devices.'" *Allied-Bruce*, 513 U.S. at 280 (quoting H.R. REP. NO. 97-542, at 13 (1982)). These advantages are particularly "helpful to individuals * * * who need a less expensive alternative to litigation." *Ibid.* In fact, a recent study that compared employment claims filed with the American Arbitration Association with similar claims filed in federal court determined that, on average, the cases that went to arbitration were resolved in half the time that it took to resolve cases that were litigated in court. See Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 55 (1998). It is therefore not surprising that Congress recently reaffirmed its view that arbitration helps avoid the "delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation." Y2K Act of 1999, Pub. L. No. 106-37 § 2(a)(3)(B)(iv), 113 Stat. 186.

Arbitration agreements possess the particular benefit of allowing the contracting parties to select the dispute-resolution procedures and remedies that are most appropriate to their circumstances, including the nature of the contract and the types of disputes likely to arise under it. This Court has recognized that "[a]rbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt Info. Scis., Inc.* v. *Board of Trustees of the Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989); see also *ibid.* (the parties may "specify by contract the rules under which * * * arbitration may be conducted").

There is little, if any, downside to arbitration to offset its numerous advantages. Importantly, there is no evidence that the additional speed and flexibility of arbitration is achieved at the cost of the procedural fairness associated with traditional litigation. This Court has "decline[d] to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985). Nor does arbitration disproportionately benefit large corporate entities at the expense of individuals. To the contrary, a recent study determined that individuals are four times *more* likely to prevail in arbitration than in litigation. See Maltby, 30 COLUM. HUM. RTS. L. REV. at 46-48. And, win or lose, the vast majority of those participating in arbitration are satisfied with the process. A study of securities arbitration, for example, indicated that over 90 percent of the participants believed that their cases were handled fairly. See Gary Tidwell, *et al.*, *Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrations*, at 25 (Aug. 5, 1999) (presented to the National Meeting of the Academy of Legal Studies in Business). Consumers in particular prefer arbitration over litigation by wide margins. Roger S. Haydock, *Civil Justice and Dispute Resolution in the Twenty-First Century: Mediation and Arbitration Now and for the Future*, 27 WM. MITCHELL L. REV. 745, 758 (2000).

3. It is well established that, "when a court interprets * * * provisions in an agreement covered by the FAA, 'due regard must be given to the federal policy favoring arbitration.'" *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (quoting *Volt*, 489 U.S. at 476). This "policy favoring arbitration" means, of course, that "any doubts concerning the *scope* of arbitrable issues should be resolved in favor of arbitration." *Id.* at 62 n.8 (quoting *Moses H. Cone*,

460 U.S. at 24-25) (emphasis added). But that is only part of what this pro-arbitration policy implies.

For example, because of this federal policy favoring arbitration, state laws that discourage or interfere with arbitration are preempted by federal law. See, *e.g.*, *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 688 (1996) ("The goals and policies of the FAA * * * are antithetical to threshold limitations placed specifically and solely on arbitration provisions.") (quotation marks omitted). As Justice Scalia rhetorically asked during the oral argument in *Bazzle*:

> Why isn't the Federal Arbitration Act more reasonably interpreted as directed at those State laws that * * * are destructive of arbitration, that * * * are hostile not in the sense of any * * * mental intent, but that in their operation make it difficult for parties to enter into arbitration agreements?

Tr. of Oral Argument, *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444 (No. 02-634), at 53 (Apr. 22, 2003). See also, *e.g.*, *Saturn Distrib. Corp.* v. *Williams*, 905 F.2d 719, 723 (4th Cir. 1990) ("The FAA does not allow a state * * * to circumvent Congressional intent by enacting special rules to discourage or prohibit the formation of agreements to arbitrate.").

Similarly, this federal policy means that courts must not go out of their way to interpret contracts in a fashion that will deter parties from including arbitration provisions in their contracts in the future. See, *e.g.*, *Waffle House*, 534 U.S. at 310 (Thomas, J., dissenting) (a "result [that] discourages the use of arbitration agreements [is] completely inconsistent with the policies underlying the FAA").

Finally, this animating principle necessarily means that, if possible, the FAA *itself* must be interpreted not to discourage arbitration. Cf. *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979 ("in all cases of statutory construc-

tion, our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve"). An interpretation of the FAA—or of state law—that leads people to stop agreeing to arbitrate disputes in the future cannot possibly be said to be pro-arbitration.

However, as we discuss below, that is precisely what may happen as a result of the decision of the court of appeals in this case.

B. The Decision Below Is Effectively A Poison Pill That Will Lead Contracting Parties Not To Include Arbitration Clauses In Their Contracts In The Future.

1. The court of appeals refused to subject a $6 million punitive award that is 3,000 times the plaintiffs' compensatory damages to more than the most minimal scrutiny. Instead, the court held that the arbitrator had not "manifest[ly] disregard[ed]" the law (Pet. App. 13a) even though he (i) awarded an amount of punitive damages far beyond that which any court could plausibly have awarded consistent with due process (see Pet. 21-22), and in so doing (ii) relied on the net worth of the defendant despite this Court's explicit admonition that a defendant's wealth cannot be used to justify an otherwise-excessive award of punitive damages (see *State Farm*, 538 U.S. at 427).

As the petitioner has explained, courts have reached a wide variety of conclusions as to whether arbitral awards of punitive damages are subject to judicial scrutiny at all, and if so the level of scrutiny to which they must be subjected. See Pet. 23-25. This chaos in the lower courts cries out for Supreme Court review. But further review is all the more important because the *effect* of rulings like the decision below will be to deter parties from agreeing to arbitration in the first place.

Everyone understands that arbitration involves trade-offs, with the parties accepting truncated procedures in exchange for the "'simplicity, informality, and expedition'" that characterize arbitration. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *Mitsubishi*, 473 U.S. at 628); see also, *e.g.*, *Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong., 1st Sess., at 7 (1924) (statement of Charles Bernheimer, N.Y. Chamber of Commerce) ("arbitration saves time, saves trouble, saves money."). As part of this trade-off, it is a commonplace that "courts accord an extraordinary level of deference" to arbitral awards, even if an award may "rest[] on errors of fact or on a misinterpretation of the contract." Pet. App. 5a (internal quotation marks and citations omitted).

At the same time, if safeguards do not exist against crushing amounts of punitive damages being added at will to arbitral awards, the careful calculus that makes arbitration an attractive alternative to litigation will be undermined. To "ensur[e] that an award of punitive damages [by a court] is based upon an 'application of law, rather than a decisionmaker's caprice,'" this Court has mandated that any such award be subjected to "[e]xacting appellate review." *State Farm*, 538 U.S. at 418 (quoting *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001)). But nothing suggests that arbitrators will award smaller amounts of punitive damages than juries. See Neil Vidmar, *Are Juries Competent to Decide Liability in Tort Cases Involving Scientific/Medical Issues? Some Data from Medical Malpractice*, 43 EMORY L.J. 885, 907 (1994) (data does not support the hypothesis that juries award larger punitive awards than arbitrators). Thus, if an arbitrator's award of punitive damages is subject to no review (or to only extremely limited review) by a confirming court, contracting parties may well decide that the risk of a massive punitive award

being assessed against them outweighs the possible benefits of arbitration.[2]

In fact, in light of the court of appeal's decision in this very case, one commentator has suggested that businesses drafting contracts "think twice about arbitration agreements." Dan Schechter, *Arbitrator's $6 Million Punitive Damage Award Against Lender Is Upheld, Despite 3000-to-1 Ratio; Punitive Damage Waiver Invalid Under State Law*, COMM. FIN. NEWSLETTER, Sept. 13, 2004, at 64. During the oral argument in *Bazzle*, Justice Souter noted the same concern—there, over the effect of a more-or-less unreviewable decision by an arbitrator to certify a class in an arbitration—by questioning whether, "[w]ithout judicial review, [a party to a contract] would * * * have rolled the dice for $27 million on one arbitrator." *See* Tr. of Oral Argument, *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444 (No. 02-634), at 47 (Apr. 22, 2003).

2. Of course, if the FAA really *did* mandate that the amount of an award of punitive damages is essentially unreviewable in court, this Court could do nothing about it even though that rule could prove to be the death-knell for contractual arbitration clauses.[3] But the lower court was wrong in so holding, for at least two distinct reasons.

First, an excessive award of punitive damages necessarily evinces a "manifest disregard of the law." See, *e.g.*, *Sawtelle* v. *Waddell & Reed, Inc.*, 754 N.Y.S.2d 264, 269-270 (App. Div. 2003) (vacating arbitrator's award of punitive damages

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[2] Of course, under an arbitration agreement that allows the arbitrator to award punitive damages, such damages could be awarded to either party—but most businesses will find little comfort from that, as the concern about an astronomic award *against* the company will far outweigh any possibility of recovering a large award of punitive damages.

[3] Because of the negative effects of such a conclusion, that determination should in any event come only from this Court.

as excessive); *Birmingham News Co.* v. *Horn*, __ So.2d __, 2004 WL 1293993, at *39 (Ala. June 11, 2004) (reviewing arbitrator's award of punitive damages for compliance with *State Farm* under "manifest disregard" standard); cf. *Cole* v. *Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1486-1487 (D.C. Cir. 1997).

Second, although a number of courts have held that the due process clause does not apply to punitive damages awarded by an arbitrator,[4] that conclusion is legally unsupportable. It is the *confirming court itself* that is denying the respondent its right to due process by confirming an excessive award of punitive damages. See, *e.g.*, Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 619-629 (1997); cf. *Shelley* v. *Kraemer*, 334 U.S. 1 (1948) (court enforcement of a private racial covenant is state action and violates the Equal Protection Clause).

For both of these reasons, the court of appeals plainly erred, and this Court should grant certiorari and reverse.

3. The court of appeals also held that Missouri law explicitly forbids parties from contractually agreeing to waive the right to collect punitive damages for intentional torts. See Pet. App. 8a. As petitioner has explained, that conclusion rests on an at-best tenuous interpretation of state law, and denies petitioner due process under *State Farm*. See Pet. 12-18.[5] Furthermore, this ruling, too, is a poison pill that may

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[4] See, *e.g.*, *Davis* v. *Prudential Sec., Inc.*, 59 F.3d 1186, 1190-1192 (11th Cir. 1995).

[5] The overwhelming majority of the federal courts of appeals that have addressed the issue have held that "the parties can stipulate to whatever procedures they want to govern the arbitration of their disputes * * * [and] surely can stipulate that punitive damages will not be awarded." *Baravati* v. *Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994). See, *e.g.*, *Inv. Partners, L.P.* v.

lead parties to choose not to agree to arbitrate (or at least not to agree to arbitrate claims arising under Missouri law).

Even standing alone, this new impediment to arbitration would warrant the Court's intervention. However, such intervention is all the more needed because the decision below is just one of a number of recent lower-court cases that have had the effect of substantially reducing the attractiveness of arbitration on the basis of at-best arguable interpretations of state law.

The specific issues in these cases have varied. For example, several courts have held that it is unconscionable under state law for the parties to an arbitration agreement to agree to waive the ability to proceed on a class-wide basis. See, *e.g.*, *Ting* v. *AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003); *Szetela* v. *Discover Bank*, 97 Cal. App. 4th 1094 (2002); *State ex rel. Dunlap* v. *Berger*, 567 S.E.2d 265 (W. Va. 2002); *Powertel, Inc.* v. *Bexley*, 743 So. 2d 570 (Fla. 1st DCA 1999).[6] Other courts have found confidentiality provi-

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Glamour Shots Licensing, Inc., 298 F.3d 314, 318 (5th Cir. 2002); *Long* v. *Silver*, 248 F.3d 309, 319 (4th Cir. 2001); *Bowen* v. *Amoco Pipeline Co.*, 254 F.3d 925, 939-940 (10th Cir. 2001); *Davis*, 59 F.3d at 1189; *Raytheon Co.* v. *Automated Bus. Sys., Inc.*, 882 F.2d 6, 12 (1st Cir. 1989).

However, given the principle of *contra proferentum*—on which the court of appeals relied in the alternative to hold that punitive damages were available in this case (see Pet. App. 9a-11a)—it is imperative that this Court hold that any punitive-damages award by an arbitrator must be reviewable for excessiveness.

[6] By contrast, every federal court of appeals that has addressed the issue, except for the Ninth Circuit, has held that there is nothing unconscionable about a class-action waiver in an arbitration agreement. See, *e.g.*, *Jenkins* v. *First Am. Cash Advance of Ga., LLC*, __ F.3d __, 2005 WL 388269, at *8 (11th Cir. Feb. 18, 2005); *Iberia Credit Bureau, Inc.* v. *Cingular Wireless LLC*, 379 F.3d 159, 174-175 (5th Cir. 2004); *Livingston* v. *Assocs. Fin., Inc.*,

sions in arbitration clauses to be unconscionable under state law (see, *e.g.*, *Ting*, 319 F.3d at 1151-1152), or have questioned limits placed on discovery in arbitration (see, *e.g.*, *Armendariz* v. *Foundation Health PsychCare Servs., Inc.*, 24 Cal. 4th 83, 104-105 (2000)).

The unifying theme of these cases—including the Eighth Circuit's holding that Missouri law precludes parties from waiving punitive damages in an arbitration agreement—is that each conditions the right to enforce an arbitration agreement on the acceptance of procedures and/or remedies that directly conflict with the animating principles of the FAA. In their zeal to superimpose the procedures of litigation onto arbitration, these courts have created a Frankenstein's monster that "stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress" in the enactment of the FAA and therefore is preempted under the Supremacy Clause. *United States* v. *Locke*, 529 U.S. 89, 109 (2000) (internal quotation marks and citation omitted).

Individually and together, these deeply flawed decisions threaten to induce businesses to stop including arbitration provisions in their contracts. See, *e.g.*, Jack Wilson, *"No-Class-Action Arbitration Clauses," State-Law Unconscionability, And the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUIN. L. REV. 737, 778 (2004) (state-law rule precluding class-action waivers may lead "firms [to] conclude that the known, class litigation, is preferable to unknown, class arbitration. Class arbitration just seems to present too many risks."); Schechter, *supra*, COMM. FIN. NEWSLETTER, Sept. 13, 2004, at 64. The Court should grant certiorari to reverse the lower court's inappropriate reliance on state law and to clarify that the FAA

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339 F.3d 553, 559 (7th Cir. 2003); *Snowden* v. *Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); *Johnson* v. *W. Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000); but see *Ting*, 319 F.3d at 1150.

preempts state-law rules that undermine the desirability of arbitration.

* * * * *

In sum, if states can mandate that arbitrators be allowed to award punitive damages, and courts thereafter cannot review the amount of any punitive award by an arbitrator for compliance with due process, parties are likely to stop including arbitration provisions in their contracts. That would entirely undermine the pro-arbitration policy of the FAA. The Court should grant certiorari to prevent the wholesale vitiation of the FAA that the Eighth Circuit's ruling threatens to effect.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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